TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1937

No. 641

J. D. ADAMS MANUFACTURING COMPANY,
APPELLANT,

vs.

WILLIAM STOREN, AS CHIEF ADMINISTRATIVE OFFICER OF THE DEPARTMENT OF TREASURY OF THE STATE OF INDIANA

APPEAL FROM THE SUPREME COURT OF THE STATE OF INDIANA

FILED DECEMBER 17, 1937.

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INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., FEBRUARY 7, 1938.

—3854

[fols. 1-2] [Caption omitted]

[fol. 3]

IN SUPERIOR COURT OF MARION COUNTY

J. D. Adams Manufacturing Company, Plaintiff,

vs.

William Storen, as Chief Administrative Officer of the Department of Treasury of the State of Indiana; Department of Treasury of the State of Indiana, Paul V. McNutt, William Storen, Floyd E. Williamson, as and Constituting the Board of Department of Treasury of the State of Indiana; Philip Lutz, Jr., as Attorney-General of the State of Indiana, Defendants

Complaint for Declaratory Judgment on the Gross Income Tax Act of 1933—Filed June 10, 1933

Plaintiff brings this suit under and pursuant to an act of the General Assembly of the State of Indiana entitled "An Act concerning declaratory judgments and decrees and to make uniform the law relating thereto" approved March 5, 1927, known as the Uniform Declaratory Judgments Acts, and complaining of the defendants above named, says:

1. Plaintiff, J. D. Adams Manufacturing Company, is a corporation duly organized and existing under the laws [fol. 4] of the State of Indiana, having its manufacturing plant, home office and principal place of business at Indianapolis, Marion County, Indiana, and is a citizen and resident of said State.

2. Defendant William Storen is the duly elected, qualified and acting Treasurer of the State of Indiana, and as such is the chief administrative officer of the Department of Treasury of the State of Indiana, and as such Treasurer is also a member of the Board of Department of Treasury of the State of Indiana.

Defendant Paul V. McNutt is the duly elected, qualified and acting Governor of the State of Indiana and as such is a member of the Board of Department of Treasury of the State of Indiana, Defendant Floyd E. Williamson is

a duly appointed, qualified and acting member of the Board of Department of Treasury of the State of Indiana. The defendants Paul V. McNutt, William Storen and Floyd E. Williamson together constitute the Board of Department of Treasury of the State of Indiana and as such are in charge of the Department of Treasury of the State of Indiana.

Defendant Philip Lutz, Jr. is the duly elected qualified and acting Attorney General of the State of Indiana.

Defendants are the state officials charged with the duty of administering and enforcing the gross income tax act of 1933 hereinafter referred to, and of assessing, levying and collecting the taxes provided for therein.

[fol. 5] 3. Plaintiff is the owner of real and personal property located in said City and State and pays taxes levied thereon for state, municipal and local purposes; and if the certain law enacted by the General Assembly of the State of Indiana, known as the "Gross Income Tax Act of 1933" (Chapter 50 Acts 1933) hereinafter referred to, be valid and enforceable in any of its provisions as applied to the plaintiff, plaintiff will also be compelled to pay such taxes as are levied and assessed against it by the defendants in such amounts and in such manner as said act shall be construed and applied to the plaintiff by said defendants; and plaintiff brings this action in its own behalf and in a representative capacity in behalf of all other taxpayers, citizens and residents of Indiana or elsewhere who are similarly situated.

4. Plaintiff is engaged in the business of manufacturing for sale various kinds of machinery, tools, appliances and equipment for the construction, improvement, working, repair and maintenance of roads and highways. Plaintiff's only factory is located at Indianapolis in the State of Indiana. Plaintiff as a manufacturer engaged in the business aforesaid, sells and disposes of its various products within the State of Indiana, and in other states and territories of the United States, and in foreign countries, as follows:

(a) Plaintiff sells a substantial part of its products in quantities to independent distributors located in various states other than the State of Indiana. Such distributors [fol. 6] resell said products to their own customers. Such distributors are not the agents of the plaintiff nor are they

subject to plaintiff's control but are in each case engaged in business on their own account as independent dealers. The products so sold to distributors are shipped from plaintiff's factory direct to such distributors in other states upon orders approved at the home office of plaintiff. Plaintiff also ships its products upon orders of the distributor, approved at the home office of plaintiff, direct from plaintiff's factory to purchasers from the distributor, all such shipments being made to states other than Indiana. Payments for all such products are made by the distributors direct to the plaintiff at its home office in Indianapolis.

Since the first day of May, 1933, when the gross income tax law hereinafter referred to became effective, plaintiff has sold and delivered products to independent distributors and to purchasers from such distributors in the manner above stated, the entire gross income from which will be in excess of Fifteen Thousand Dollars ($15,000), a part of which has been collected and received and the remaining part will be collected and received as the same falls due; and plaintiff expects to and will in regular course of its business sell further larger quantities of its products in the manner aforesaid, and will collect and receive further gross income therefrom in a substantial sum, the exact amount of which cannot now be estimated.

[fol. 7] (b) Plaintiff sells a substantial part of its products to purchasers located in states other than Indiana through agents of the plaintiff who solicit and take orders in such states for said products. All such sales are made upon orders subject to approval at the home office of plaintiff, and such products are shipped from plaintiff's factory direct to the purchasers in other states. Payments for said products are made to plaintiff at its home office in Indianapolis. A portion of such sales are to ultimate users, and a portion of such sales are in quantities to dealers who resell such products.

Since the first day of May, 1933, plaintiff has sold and delivered products in the manner above stated to customers outside the State of Indiana, the entire gross income from which will be in excess of Five Thousand Dollars ($5,000), a part of which has been collected and received and the remaining part will be collected and received as the same falls due; and plaintiff expects to and will in the regular course of its buseiness sell further large quantities of its

products in the manner aforesaid and will collect and receive further gross income therefrom in substantial sums, the exact amount of which cannot now be estimated.

Of the total amount of gross income received or to be received from sales to purchasers outside the State of Indiana in the manner aforesaid, an amount in excess of Two Thousand Dollars ($2,000) has been or will be received from purchasers who are ultimate users of the products sold to them.

[fol. 8] (c) Plaintiff sells a substantial part of its products through its agents, on orders subject to approval at its home office, to purchasers in the Dominion of Canada and other foreign countries. All products as sold are shipped from plaintiff's factory direct to the purchasers in such foreign countries, and payment is made therefor at the home office of the plaintiff in Indianapolis.

Since the first day of May, 1933, plaintiff has sold and delivered products to foreign countries as above described, the entire gross income from which will be ~~in excess~~ of One Thousand Five Hundred Dollars ($1,500), a part of which has been collected and received as the same falls due; and plaintiff expects to and will in the regular course of its business sell further large quantities of its products in the manner aforesaid and will collect and receive further gross income therefrom in a substantial sum, the exact amount of which cannot now be estimated.

(d) Plaintiff sells a part of its products through its agents to the Government of the United States, its departments or agencies, on orders approved at the home office of the plaintiff. Such products so sold are delivered to the United States Government, its departments or agencies in the various states of the United States, including the State of Indiana, as instructed by the Government at the time of sale.

Since the first day of May, 1933, plaintiff has sold and delivered products to the United States Government as above stated, the entire gross income from which will be in [fol. 9] excess of Two Thousand Dollars ($2,000), a part of which has been collected and received and the remaining part will be collected and received as the same falls due; and plaintiff expects to and will in the regular course of its business sell further quantities of its products in the manner aforesaid and will collect and receive further gross income

therefrom in a substantial sum, the exact amount of which cannot now be estimated.

(e) Plaintiff sells a substantial portion of its products, and delivers the same direct from its factory, to purchasers within the State of Indiana. A portion of said products so sold in Indiana is sold to purchasers who are the ultimate users thereof, and the remaining portion thereof is sold to independent dealers [who resell to independent dealers]* who resell the same in Indiana and other states and foreign countries.

Since the first day of May, 1933, plaintiff has sold and delivered products in the manner above stated, the entire gross income from which will be in excess of Thirty-five Thousand Dollars ($35,000), a part of which has been collected and received and the remaining portion of which will be collected and received as the same falls due; and plaintiff expects to and will in the regular course of its business sell further quantities of its products in the manner aforesaid and will collect and receive further gross income therefrom in a substantial sum, the exact amount of which cannot now be estimated.

5. Plaintiff during certain seasons each year when all of its working capital is not represented in raw materials, [fol. 10] work in process or completed products, regularly invests for temporary periods a substantial portion of its working capital in bonds, notes and other evidence of indebtedness issued by municipal corporations within the State of Indiana; all of which bonds, notes and other evidence of indebtedness bear interest, and by the statutes of Indiana in force now and at the time of issuance of such bonds (being Section 6 of an Act entitled "An Act concerning taxation, repealing all laws in conflict therewith and declaring an emergency, approved March 11, 1919" as amended by Chapter 191, Acts of 1923; Section 14037 Burns Indiana Statutes 1926) are declared to be exempt from taxation. When the business of plaintiff requires the return of such working capital to its manufacturing operations, such nontaxable securities are sold and converted into cash.

Plaintiff had acquired prior to February 27, 1933, and had in its possession on May 1, 1933, securities of the character above described, representing an investment of work-

[*Matter enclosed in brackets, struck out in copy.]

ing capital of the plaintiff in excess of Two Hundred Thousand Dollars ($200,000). Since the first day of May, 1933, plaintiff has collected and received as interest earned and payable on such non-taxable obligations a total sum in excess of Two Thousand Five Hundred Dollars -$2,500). Since the first day of May, 1933, plaintiff has also collected and received as principal paid by the issuer at maturity of such non-taxable obligations a total sum in excess of One Hundred Thousand Dollars ($100,000). Since May 1, 1933, plaintiff also has sold various of such non-taxable obligations for the purpose of converting them into cash for working capital, and from such sales has collected and received [fol. 11] a total sum in excess of Ten Thousand Dollars ($10,000).

6. Plaintiff has also acquired in the manner and for the purposes above described in paragraph 5 of this complaint and is the owner and holder of One Hundred Thousand Dollars ($100,000) par value of bonds of the Fletcher Joint Stock Land Bank (at Indianapolis, Indiana), which bonds were issued pursuant to an Act of the Congress of the United States which became a law July 17, 1916 (Chapter 245, 39 Stat. at Large 380, Sec. 26; U. S. C. A. Title 12, Secs. 641 and 931) and are by said Act declared to be instrumentalities of the United States and both as to principal and interest exempt from federal, state, municipal and local taxation. Since the first day of May, 1933, plaintiff has collected and received as interest earned and payable on such bonds the sum of Two Thousand Five Hundred Dollars ($2,500).

7. At its regular session in 1933 the General Assembly of the State of Indiana passed an act entitled "An Act to provide for the raising of public revenue by imposing a tax upon the receipt of gross income, to provide for the ascertainment, assessment and collection of said tax, and to provide penalties for the violation of the terms of this act, and declaring an emergency", which act was approved and became a law on February 27, 1933, and by its terms took effect and was in force from and after the first day of May, 1933, and is published as Chapter 50 at page 388 of the Acts of 1933, and is known and cited as the "Gross Income Tax Act of 1933."

8. Said gross income tax act of 1933 purports, among other things, to impose a tax upon the entire gross income [fol. 12] (as the term "gross income" is defined in Section 1

of the act) of all residents of the State of Indiana, which tax shall apply to, and be levied and collected upon, all gross income received on or after the first day of May, 1933, with such exceptions and limitations as are in the act provided.

The rates of the tax imposed by said act are, in general terms, as follows: (a) upon the entire gross income of every person engaged in the business of manufacturing, a tax at the rate of one-fourth of one per cent; (b) upon the entire gross income of every person engaged in the business of wholesaling or jobbing, a tax at the rate of one-fourth of one per cent; (c) upon the entire gross income of every person engaged in the business of retailing, a tax at the rate of one per cent; (d) upon the entire gross income of every person engaged in the business of operating a public utility, a tax at the rate of one per cent (e) upon the entire gross income of every person engaged in the business of operating any bank, finance company or other business of a similar nature, a tax at the rate of one per cent; (f) upon the gross income of all persons not enumerated above and upon all receipts from any source whatsoever, a tax at the rate of one per cent; all as set forth more specifically and in detail in Section 3 of said Act. In computing such tax, each taxpayer is allowed a deduction from gross income of One Thousand Dollars ($1,000).

[fol. 13] The tax is computed by quarterly periods ending on the last day of March, June, September and December in each year; and unless otherwise ordered by the Department of Treasury each taxpayer liable for a total tax exceeding Ten Dollars ($10) for the preceding quarter is required to file a return within fifteen days after the end of each quarter, the first return being required to be made on or before the 15th day of July, 1933, covering the period from May 1 to June 30, 1933.

The tax is required to be paid with the filing of the return. In the event that a tax less than the tax found by the Department to be due is paid the taxpayer is bound to pay the balance with interest at the rate of one per cent per month from the time the tax was due. If the deficiency in the amount of tax is due to negligence or intentional disregard of the rules and regulations of the Department of Treasury, but without intent to defraud, there is then added a penalty to ten per cent of the total amount of the deficiency in tax and interest at the rate of one per cent

per month from the time the tax was due. If the deficiency was due to fraud, with intent to evade the tax, then there is added as a penalty fifty per cent of the total amount of the deficiency with interest at one per cent per month.

The act requires every person subject to the tax to keep and preserve suitable records of his gross income and such other books or accounts as may be necessary to determine the amount of the tax, and it is made the duty of each person to keep and preserve such records for a period of two years open for examination at any time by the Department [fol. 14] of Treasury or its duly authorized agents.

If any taxes imposed are not paid within sixty days after the same are due, the Department of Treasury may issue a warrant directing the Sheriff to levy and sell the real and personal property of the person owing the tax. Any person against whom a tax shall be assessed may be restrained and enjoined upon [the]* order of the Department of Treasury by proceedings instituted in the name of the State of Indiana by the Attorney General or any Prosecuting Attorney from engaging and continuing in business until the tax shall have been paid and until such person shall have complied with the provisions of the act.

9. Section 6 (a) of said gross income tax act of 1933 provides that so much of a taxpayer's gross income as is derived from business conducted in commerce between the State of Indiana and other states of the United States, or between the State of Indiana and foreign countries, shall be excepted from taxation to the extent to which the State of Indiana is prohibited from taxing the same under the Constitution of the United States. Defendants and each of them are asserting that the Constitution of the United States does not in any way prohibit the levying of a tax upon gross income derived from business conducted in commerce between the State of Indiana and other states of the United States or between the State of Indiana and foreign countries, and that plaintiff is required to file a return, and is liable to pay a tax at the rate prescribed in said act, upon the entire gross income of plaintiff, including that [fol. 15] derived from interstate and foreign commerce as set forth in paragraphs 4 (a), 4 (b) and 4 (c) of this complaint.

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* [Matter enclosed in brackets, struck out in copy.]

Plaintiff says that under the Constitution of the United States, the State of Indiana is prohibited from levying a tax upon the gross income derived from plaintiff's commerce between the State of Indiana and other states of the United States, and from levying a tax upon gross income derived from plaintiff's commerce between the State of Indiana and foreign countries, and, without the consent of Congress, from laying any duties on articles exported by plaintiff to foreign countries, as set out in paragraphs 4 (a), 4 (b) and 4 (c) hereof, and that the true intent of the General Assembly of Indiana in enacting said gross income tax act, and especially Section 6 (a) thereof, was to exempt from taxation as a part of the gross income of any taxpayer, the gross income derived from interstate and foreign commerce.

Plaintiff further says that if said act, when construed according to its true intent, imposes a tax on the gross income of plaintiff derived from its business conducted as set forth in paragraphs 4 (a), 4 (b) and 4 (c) hereof, then said act is invalid and void for the reason that such tax constitutes a regulation of and a burden upon interstate and foreign commerce, and a duty upon exports without the consent of Congress, and is in violation of Section 8 and Section 10 of Article I of the Constitution of the United States. For the foregoing reasons the defendants and each of them are without authority to require plaintiff [fol. 16] to file a return or to pay a tax upon the gross income derived from its business conducted as set forth in paragraphs 4 (a), 4 (b) and 4 (c) of this complaint, but defendants nevertheless are now asserting such right and declaring their intention to collect such tax.

10. Section 6 (c) of said gross income act of 1933 provides that so much of taxpayer's gross income as is derived from sales to the United States Government, its department or agencies, shall be excepted from taxation to the extent to which the State of Indiana is prohibited from taxing the same under the Constitution of the United States. Defendants and each of them are asserting that the Constitution of the United States does not in any way prohibit the levying of a tax upon gross income derived from sales to the United States Government, its departments or agencies, and that plaintiff is required to file a return and is liable to pay a tax at the rate prescribed in said act, upon

the entire gross income of plaintiff, including that derived from sales to the United States Government, its departments or agencies, as set forth in paragraph 4 (d) of this complaint.

Plaintiff says that under the Constitution of the United States, the State of Indiana is prohibited from levying a tax upon the gross income derived from plaintiff's sales to the United States Government, its departments or agencies, as set out in paragraph 4 (d) hereof, and that the true intent of the General Assembly of Indiana is enacting said [fol. 17] gross income act, and especially Section 6 (c) thereof, was to exempt from taxation as a part of the gross income of any taxpayer, the gross income derived from sales to the United States Government, its departments or agencies.

Plaintiff further says that if said act, when construed according to its true intent, imposes a tax on the gross income of plaintiff derived from its sales to the United States Government, its departments or agencies, as set forth in paragraph 4 (d) hereof, then said act is invalid and void for the reason that such tax constitutes a regulation of and a burden upon the powers and functions of the United States Government and is in violation of the Constitution of the United States, and particularly of Section 8 of Article 1 thereof. For the foregoing reasons the defendants and each of them are without authority to require plaintiff to file a return or to pay a tax upon the gross income derived from its business conducted as set forth in paragraph 4 (d) of this complaint, but defendants nevertheless are asserting such right and declaring their intention to collect such tax.

11. Plaintiff says that said gross income act of 1933 is invalid and void to the extent that a tax is levied upon (a) that part of the gross income of plaintiff which is derived from interest upon the tax exempt bonds, notes and other evidences of indebtedness of municipal corporations within the State of Indiana and each of them described in paragraph 5 of this complaint; (b) upon that part of the gross income of plaintiff which represents funds received upon maturities of any of such tax exempt obliga- [fol. 18] tions described in paragraph 5 of this complaint; and (c) upon that part of the gross income of plaintiff which is derived from the sale of any of such tax exempt

obligations described in paragraph 5 of this complaint; for the reason that the tax upon such gross income impairs the obligation of the contracts existing between plaintiff and each of the municipalities or political subdivisions which issued the obligations, and in such respect, said act is in conflict with Section 10 of Article 1 of the Constitution of the United States and with Section 24 of Article 1 of the Constitution of Indiana.

12. Plaintiff further says that said gross income tax act of 1933 is invalid and void to the extent that a tax is levied upon that part of the gross income of plaintiff which is derived from interest upon the tax exempt bonds of the Fletcher Joint Stock Land Bank as described in paragraph 6 of this complaint, for the reason that the tax upon such gross income constitutes a tax upon an instrumentality of the United States and also impairs the obligation of the contract existing between the plaintiff and the issuer of said bonds, and in such respect said act is in conflict with Sections 8 and 10 of Article 1 of the Constitution of the United States and with Section 24 of Article 1 of the Constitution of Indiana.

13. Plaintiff's business is that of manufacturing, and the sale of its products is only an incident to such business. Plaintiff is not engaged in the business of wholesaling or jobbing as defined in Section 3 (b) of the act, nor in the [fol. 19] business of retailing as defined in Section 3 (c) but is engaged only in the business of manufacturing as defined in Section 3 (a) of the act; and under said section, plaintiff's gross income is taxable only at the rate of one-fourth of one per cent, and no part of such gross income whether derived from the sale of products in quantities to dealers or distributors, or from the sale of single units to purchasers who are ultimate users of the same, is taxable at any other rate than that provided in said Section 3 (a) of the Act. Notwithstanding the aforesaid defendants and each of them are asserting the right to require the plaintiff to file a return and pay a tax under Section 3(c) of said gross income tax act at the rate of one per cent upon that part of plaintiff's gross income which is derived from sales of its products to purchasers who are the ultimate or users thereof.

14. Since the first day of May, 1933, when said gross income tax act became effective, the defendants and each

of them have been and are promulgating rules and regulations for the making of returns and for the ascertainment, assessment and collection of the tax imposed under such act, and have been and are issuing instruments and directions to plaintiff and other taxpayers as to the returns to be filed and the extent of the taxes to be paid by them under said act. In connection with and pursuant to such rules, regulations, instructions and directions, defendants have been and are now demanding that plaintiff file its return, and pay the taxes asserted by defendants to be collectible upon gross income received by plaintiff since May [fol. 20] 1, 1933, and to be received by it during the current and succeeding taxable periods, as follows:

(a) Upon the gross income received by plaintiff in interstate and foreign commerce conducted as set forth in paragraphs 4 (a), 4 (b) and 4 (c) and referred to in paragraph 9 of this complaint;

(b) Upon the gross income received by plaintiff from sales of its products to the United States Government, its departments or agencies;

(c) Upon the gross income received by plaintiff from tax exempt securities, including interest collected thereon, principal collected on payment at maturity and proceeds from the sale of such securities as set forth in paragraphs 5 and 6 and referred to in paragraphs 11 and 12 of this complaint;

(d) Upon the gross income of all sales of products by the plaintiff, at the rate of one per cent provided in Section 3 (c) of said act, where the purchaser is the ultimate user thereof, as set forth in paragraphs 4 (b) and 4 (*e*) and referred to in paragraph 13 of this complaint;

and [that]* said defendants and each of them have determined to enforce their said demands upon the plaintiff, and unless prevented by judgment and decree of this Court, will proceed to enforce such demands to the extent of invoking and inflicting the various civil and penal provisions of said act if plaintiff shall fail to comply with such demand.

[fol. 21] 15. Plaintiff says that, by reason of the declared intention and determination of defendants to levy and col-

* [Matter enclosed in brackets struck out in copy.]

lect taxes upon all portions of the entire gross income of plaintiff in the manner and to the extent hereinabove alleged, and the contention of plaintiff as hereinabove stated that such levy and collection of the taxes claimed by defendants upon certain portions of plaintiff's gross income hereinabove referred to will be unlawful and invalid, an actual controversy exists between the plaintiff in its own behalf and in behalf of other taxpayers similarly situated and the defendants hereto; and that it is necessary in order to protect the rights of plaintiff and others similarly situated that the rights, status and legal relations of the plaintiff and of the defendants to this proceeding in respect to the subject matter hereof be determined and declared by this Court.

Wherefore plaintiff prays:

1. That this Court cause summons to be served upon each of the several defendants hereinabove named, and also cause a copy of this complaint to be served upon the Attorney General of the State of Indiana, fixing a time when the parties defendant and said Attorney General may be heard.

2. That this Court determine, adjudge and decree that said gross income tax of 1933 does not require the levy and collection of a tax upon gross income derived from interstate or foreign commerce as conducted by the plaintiff; or if such act be construed to require the levy and collection of [fol. 22] such tax, then that the Court determine, adjudge and decree that said act is unconstitutional and void in so far as it applies to gross income derived from business conducted by the plaintiff in interstate and foreign commerce.

3. That this court determine, adjudge and decree that said gross income act of 1933 does not require the levy and collection of a tax upon gross income derived from sales by the plaintiff of its products to the United States Government, its departments or agencies; or if such act be construed to require the levy and collection of such tax, then that the Court determine, adjudge and decree that said act is unconstitutional in so far as it applies to gross income of the plaintiff derived from its sales to the United States Government, its departments or agencies.

4. That this Court determine, adjudge and decree that said gross income tax act is unconstitutional and void in so far as it requires the plaintiff to pay a tax upon that part

of its gross income derived from interest, principal or proceeds from the sale of securities which are by prior statutes declared to be exempt from taxation or to be instrumentalities of the United States.

5. That this Court determine, adjudge and decree that no tax is collectible from the plaintiff, as a person engaged in the business of Manufacturing upon any part of its gross [fols. 23-24] income at a rate in excess of one-fourth of one per cent as provided in Section 3(a) of said Act.

6. And that this Court grant to plaintiff all other proper relief in the premises.

Frederick E. Matson, Attorney for Plaintiff.
Schortemeier, Eby & Wood, Bamberger & Feibleman, Baker & Daniels, White, Wright & Boleman, Matson, Ross, McCord & Clifford, of Counsel.

[fol. 25] In Superior Court of Marion County

Summons and Return

State of Indiana,
Marion County, ss:

The State of Indiana, to the Sheriff of Marion County, Greeting:

You are hereby commanded to summon William Storen, as Chief Administrative Officer of the Department of Treasury of the State of Indiana, (242 State House, Indianapolis); Department of Treasury of the State of Indiana (Serve upon William Storen, 242 State House, Indianapolis); Paul V. McNutt, William Storen and Floyd E. Williamson, as and constituting the Board of Department of Treasury of the State of Indiana, (State House, Indianapolis); Philip Lutz, Jr. as Attorney General of the State of Indiana (219 State House, Indianapolis) Serve also copy of complaint upon Attorney General; to appear before the Judge of the Superior Court of Marion County, Indiana, on the 23rd day of June, 1933, being the 17th Judicial Day of the June Term, 1933, of said Court, which term commence at the Court House in the City of Indianapolis on the first Monday in said month and year last above named then and there to an-

swer the complaint of J. D. Adams Manufacturing Company and have you then and there this writ.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of said Superior Court, at my office in the City of Indianapolis, the 10th day of June, 1933.

Glen B. Ralston, Clerk Superior Court of Marion County. (Seal.)

[fols. 26-27] Came to hand June 10, 1933 and served the within named Department of Treasury of the State of Indiana by reading this writ to, and within the hearing of William Storen, Chief Officer of said Department and deliverying to him a true copy thereof.

Charles L. Summer, Sheriff of Marion County, June 12, 1933, Per John Brewington, Deputy

and served this writ by reading to and within the hearing of the within named William Storen as Chief Administrative officer of the Department of Treasury of the State of Indiana Paul V. McNutt, William Storen, Floyd E. Williamson, as and constituting the Board of Department of Treasury of the State of Indiana, Philip Lutz, Jr. as attorney General of the State of Indiana, also by serving copy of Complaint upon said Philip Lutz and delivering to them a true copy of the same.

Charles L. Summer, Sheriff of Marion County, June 12, 1933, Per John Brewington, Deputy.

[fols. 28-29] In Superior Court of Marion County

[Title omitted]

Appearance of Counsel for Defendants—Filed June 17, 1933

The undersigned hereby enter their Appearance for all of the defendants in the above entitled cause.

Phillip Lutz, Jr., Attorney General; Fred A. Wiecking, Asst. A. G.; Joseph P. McNamara, Deputy A. G.

Address 219 State House. Phone Li. 3127.

[fols. 30-31] In Superior Court of Marion County

[Title omitted]

Defendants' Answer—Filed June 17, 1933

The defendants, for answer to the complaint herein, deny each and all of the allegations thereof.

Philip Lutz, Jr., Attorney General; Fred A. Wiecking, First Assistant Attorney General; Joseph L. McNamara, Deputy Attorney General, Attorneys for Defendants.

[fol. 32] In Superior Court of Marion County

Finding of Court—June 28, 1933

Comes now plaintiff in the above entitled cause by Frederick E. Matson, Austin V. Clifford, Harry T. Ice, Frederick E. Shortemeier, Warrack Wallace, Ralph Bamberger and Burrell Wright, its attorneys, and the defendants by Philip Lutz, Jr., Attorney General of the State of Indiana, Fred A. Wiecking, First Assistant Attorney General, and Joseph P. McNamara, Deputy Attorney General, and all of the parties named as defendants in the complaint having been duly served with summons and all said defendants having appeared and filed their several answers in general denial, and this cause being now submitted for trial without the intervention of a jury, and a stipulation of facts agreed to by all of the parties having been offered and received in evidence in lieu of oral testimony, said stipulation constituting all of the evidence in the case, and the Court, having heard the arguments of counsel and being duly advised in the premises, now finds for the plaintiff that the allegations of the complaint and the facts set forth in the stipulation are true; that a controversy exists between the plaintiff and defendants involving the rights, status and legal relations of the parties to this cause in respect to each of the situations described in the complaint and to the interpretation or validity of certain provisions of an Act of the General Assembly of the State of Indiana entitled "An Act to provide [fol. 33] for the raising of public revenue by imposing a tax upon the receipt of gross income, to provide for the ascertainment, assessment and collection of said tax, and to pro-

vide penalties for the violation of the terms of this act, and declaring an emergency", which was approved and became a law on February 27, 1933, and by its terms took effect and was in force from and after the first day of May 1933, and is published as Chapter 50, page 388, of the Acts of 1933, and is known and cited, and hereafter in this finding and decree referred to as the "Gross Income Tax Act of 1933"; that the rights, status and legal relations of plaintiff and of all other taxpayers citizens and residents of Indiana and elsewhere who are similarly situated are affected by such Act; that the parties hereto are entitled to have their respective rights under the various provisions of said act referred to in plaintiff's complaint declared by this Court pursuant to the provisions of the Uniform Declaratory Judgment Act of Indiana; and further finds as follows:

(a) The Court finds for the plaintiff that the plaintiff is engaged in the business of manufacturing and has its only factory and its home office in the City of Indianapolis, Indiana; that plaintiff sells part of its products to independent distributors located in various states other than the State of Indiana, who are not agents of the plaintiff or sub- [fol. 34] ject to its control, and who resell said products to their own customers; that plaintiff also sells part of its products to purchasers located in states other than Indiana through agents of the plaintiff who solicit and take orders in said states for such products; that plaintiff also sells a part of its products to purchasers in foreign countries; that all such products are sold only upon orders approved at the home office of the plaintiff, and are shipped from plaintiff's factory direct to the purchasers in such other states and foreign countries; that all payments for plaintiff's products are made to plaintiff at its home office; and that the gross income of plaintiff from products so sold and shipped direct to customers in other states and foreign countries constitutes approximately eighty per cent of plaintiff's entire gross income; that to the extent plaintiff makes sales as aforesaid, plaintiff is engaged in commerce among the several states and with foreign nations and in exporting goods to foreign countries; and that said Gross Income Tax Act of 1933 does not by any of its terms or provisions authorize or require the assessment or collection of any tax upon the gross income derived by the plaintiff, or others similarly

situated, from business so conducted in commerce between the State of Indiana and other states of the United Stated or between the State of Indiana and foreign countries, but such gross income is by said act expressly excepted from [fol. 35] such tax.

(b) The Court finds for the plaintiff that plaintiff sells a part of its products to the Government of the United States, its departments or agencies, and that said Gross Income Tax Act of 1933 does not by any of its terms or provisions authorize or require the assessment or collection of any tax upon the gross income derived by the plaintiff, or others similarly situated, from sales of its products to the United States Government, its departments or agencies, but such gross income is by said act expressly excepted from such tax.

(c) The Court finds for the plaintiff that on and subsequent to May 1, 1933 plaintiff was the owner and holder of bonds, notes and other evidence of indebtedness issued by various municipal corporations within the State of Indiana, which bonds, notes and other evidences of indebtedness were issued prior to the date when said Gross Income Tax Act of 1933 became effective, and all of which bear interest, and all of which by the statutes of Indiana in force now and at the time of the issuance of said bonds are declared to be exempt from taxation; and that in so far as said Gross Income Tax Act of 1933 purports or attempts to impose or collect any tax upon gross income derived by the plaintiff from such tax exempt securities, either in the form of interest collected thereon, principal collected on [fol. 36] payment at maturity or proceeds from the sale of such securities, said act impairs the obligation of contract arising upon such securities, contrary to the Constitution of the State of Indiana and the Constitution of the United States, and to such extent is invalid and void.

(d) The Court finds for the plaintiff that on and subsequent to May 1, 1933 plaintiff was the owner and holder of certain Joint Stock Land Bank bonds which were issued pursuant to an act of the Congress of the United States which became a law July 17, 1916, and are by said Act declared to be instrumentalities of the United States and both as to principal and interest exempt from federal, state, municipal and local taxation, and that said Gross Income Tax Act of 1933 does not by any of its terms or provisions

authorize or require the assessment or collection of any tax upon the gross income derived by the plaintiff, or others similarly situated, from such securities in the form of interest collected thereon, but such gross income is by said Act expressly excepted from such tax.

(e) The Court finds for the plaintiff that plaintiff is engaged in the business of manufacturing and sells a portion of its products to purchasers who are the ultimate users thereof, but such sale of its products is only an incident to such business of manufacturing; that plaintiff does not at its factory or home office, or at any other place, maintain or operate any store, salesroom or other establishment for [fol. 37] the business of wholesaling or retailing its products, or from which sales are made but all of its products are sold only on orders accepted and approved at its home office; that plaintiff is not engaged in the business of wholesaling or jobbing as defined or referred to in Section 3 (b) of said Gross Income Tax Act of 1933, nor in the business of retailing as defined or referred to in Section 3 (c) of said act, but is engaged only in the business of manufacturing as defined or referred to in Section 3 (a) of said act; and that said Gross Income Tax Act of 1933 does not by any of its terms or provisions authorize or require the assessment, levy or collection of any tax upon the gross income derived by the plaintiff, or others similarly situated, from sales of its products so made by plaintiff to purchasers who are the ultimate users of such products, at any other rate than that provided in said section 3 (a) of said Act.

Judgment

Now therefore:

1. It is Declared, Ordered, Adjudged and Decreed that said Gross Income Tax Act of 1933 does not authorize or require the levy and collection of a tax upon gross income derived by the plaintiff, or others similarly situated, from business conducted in commerce between this state and other states of the United States or between this state and foreign countries, and that the defendants have no right, [fol. 38] authority or power to impose, assess or collect any tax upon gross income derived by the plaintiff, or others similarly situated from business conducted in commerce be-

tween this state and other states of the United States or between this state and foreign countries, and that defendants have no right, authority or power to impose, assess or collect any tax on gross income derived by the plaintiff, or others similarly situated, from sales made as stated above in paragraph (a) of this finding and decree.

2. It is Further Declared, Ordered, Adjudged and Decreed, that said Gross Income Tax Act of 1933 does not authorize or require the levy and collection of a tax upon gross income derived by the plaintiff, or others similarly situated, from sales of products to the United States Government, its departments or agencies, and that the defendants have no right, authorize or power to impose, assess or collect any tax upon the gross income derived by the plaintiff, or others similarly situated, from sales to the United States Government, its departments or agencies.

3. It is Further Declared, Ordered, Adjudged and Decreed that said Gross Income Tax Act of 1933 is unconstitutional and void in so far as it requires the plaintiff, or others similarly situated, to pay a tax upon that part of its gross income derived either from interest received on, [fol. 39] principal received on payment at maturity of, or proceeds received from sale of, bonds, notes or other evidences of indebte-ness issued prior to May 1, 1933 by municipal corporations of the State of Indiana, and which are declared by the statutes of Indiana to be exempt from taxation; and that the defendants have no right, authority or power to impose, assess or collect any tax upon gross income derived by the plaintiff, or others similarly situated, from any such securities.

4. It is Further Declared, Ordered, Adjudged and Decreed, that said Gross Income Tax Act of 1933 does not authorize or require the assessment and collection of a tax upon gross income derived by the plaintiff, or others similarly situated, from interest collected on Joint Stock Land Bank bonds or on other securities issued by instrumentalities of the United States, and that the defendants have no right, authority or power to impose, assess or collect any tax upon gross income derived by the plaintiff, or others similarly situated from any such source.

5. It is Further Declared, Ordered, Adjudged and Decreed, that said Gross Income Tax Act of 1933 does not

authorize or require the assessment or collection of a tax at any rate other than the rate imposed on the gross income of persons engaged in the business of manufacturing as specified in Section 3 (a) of said act, upon gross income [fols. 40-41] derived by the plaintiff, or others similarly situated, from sales of its products to purchasers who are the ultimate users thereof, as stated in paragraph (e) of this finding and decree, and that the defendants have no right, authority or power to impose, assess or collect any tax upon the gross income derived by the plaintiff, or others similarly situated, from any such sales so made to purchasers who are the ultimate users of such products, except at the rate specified in Section 3 (a) of said act, to-wit: at one-fourth of one per cent.

6. It is Further Declared, Ordered, Adjudged and Decreed by the Court that plaintiff have and recover of the defendants its costs in this action laid out and expended taxed at $—.

All of which is finally declared, ordered, adjudged and decreed by the Court.

Dated, June 28th, 1933.

(Signed) Russell J. Ryan, Judge of the Marion Superior Court, Room 5.

[fol. 42] In Superior Court of Marion County

[Title omitted]

Defendants' Motion for a New Trial—Filed June 30, 1933

The defendants in the above entitled cause, and each of them separately and severally, move the court for a new trial on each of the following grounds to-wit:

1. The decision of the court is not sustained by sufficient evidence.

2. The decision of the court is contrary to law.

Wherefore, the defendants, and each of them separately [fol. 43] and severally, pray the court for a new trial in the said cause.

Philip Lutz, Jr., Attorney General of Indiana; Fred W. Weicking, Assistant Attorney General; Joseph L. McNamara, Deputy Attorney General, Attorneys for Defendants.

[fol. 44] In Superior Court of Marion County

Order Overruling Motion for New Trial, etc.

And the court being duly advised in the premises, overrules the joint and several motions for a new trial heretofore filed in said cause by the defendants, to which ruling of the court the said defendants and each of them separately and severally at the time excepts. Thereupon said defendants and each of them pray an appeal to the Supreme Court of Indiana, and an appeal is granted said defendants as prayed. Said defendants and each of them ask and are given ninety (90) days in which to file all Bills of Exceptions.

[fol. 45] [File endorsement omitted]

In Superior Court of Marion County

[Title omitted]

Præcipe for Transcript of Record

To the Clerk of the Marion Circuit Court as ex-officio, Clerk of the Marion Superior Court:

The Clerk is directed to prepare and certify for use on appeal to the Supreme Court of Indiana a transcript of all papers filed in said cause, including the complaint, answer and agreed stipulation of facts, all orders and rulings, and the finding, decree and judgment rendered therein.

William Storen, as Chief Administrative Officer of the Department of Treasury of the State of In-[fol. 46] diana, Department of Treasury of the State of Indiana; Paul V. McNutt, William Storen, Floyd E. Williamson, as and Constituting the Board of Department of Treasury of the State of Indiana; Philip Lutz, Jr., as Attorney-General of the State of Indiana, by Philip Lutz, Jr., Attorney General; Fred A. Wiecking, Assistant Attorney General; Joseph L. McNamara, Deputy Attorney General, Attorneys for Defendants.

[fol. 47] IN SUPERIOR COURT OF MARION COUNTY, JUNE TERM, 1933, ROOM No. 5

No. A-72605

[Title omitted]

Bill of Exceptions—Filed September 30, 1933

Be it Remembered, That on the 26th day of June, 1933, the same being the 19th judicial day of the June Term, 1933 of the Superior Court of Marion County, State of [fol. 48] Indiana, Room No. 5, the following proceedings were had in the above entitled cause, before the Honorable Russell J. Ryan, Judge of said Court, to-wit:

The cause being at issue, the same came on for trial before the Court, without the intervention of a jury, Messrs. Schortemeier, Eby & Wood, Bamberger & Feibleman, Baker & Daniels, White, Wright & Boleman, and Matson, Ross, McCord & Clifford appearing as counsel for the Plaintiff, and Philip Lutz, Jr., Attorney General of the State of Indiana, appearing as counsel for the Defendants.

And be it Further Remembered, That before the trial was begun, for the purpose of facilitating and expediting the trial of said cause, said Judge required to be present, Lillian E. Sandstrom, Official Reporter of said court, to take down in shorthand the oral evidence, including both questions and answers, and note all rulings of the Judge in respect to the admission and rejection of evidence, and the exceptions taken thereto, and the documentary evidence offered and introduced on the trial of said cause, the said Lillian E. Sandstrom having been, at the time of her appointment, duly sworn to faithfully perform her duties as such official shorthand reporter, which said appointment and her official oath as such Reporter are of and among the records of said court.

Abd be it Further Remembered, That said Official Reporter was present and took down in shorthand the oral [fol. 49] and documentary evidence given and offered upon the trial of said cause, including both questions and answers, and noted all the objections made to the admission of evidence, all of the rulings of the Court with respect to the admission and rejection of evidence, and the exceptions taken thereto.

And the said Defendants, having requested said Official Reporter to furnish them with a complete transscript of said evidence, objections, rulings of the Court thereon, and the exceptions taken thereto, including all documentary evidence, a typewritten transcript of the same was made by said Official Reporter, which Typewritten Transcript is in the Words and Figures Following, That is to Say:

[fol. 50] The Plaintiff, to maintain the issues on its behalf, offered and introduced the following evidence, to-wit:

Exhibit No. 1, was offered and read in evidence, and made a part of the record in this case, and is in the words and figures following, to-wit:

EXHIBIT No. 1

IN SUPERIOR COURT OF MARION COUNTY

[Title omitted]

[fol. 51] STIPULATION OF FACTS

It is hereby stipulated and agreed by and between the parties to the above entitled cause that the facts hereinafter set forth shall be considered as facts proven under the issues in the cause, with the same force and effect as though established by competent evidence introduced on the trial, and shall constitute the facts upon which this cause shall be determined, viz:

1. Plaintiff, J. D. Adams Manufacturing Company, is a corporation duly organized and existing under the laws of the State of Indiana, having its manufacturing plant, home office and principal place of business at Indianapolis, Marion County, Indiana.

2. Defendant William Storen is the duly elected, qualified and acting Treasurer of the State of Indiana, and as such is the chief administrative officer of the Department of Treasury of the State of Indiana, and as such Treasurer is also a member of the Board of Department of Treasury of the State of Indiana.

Defendant Paul V. McNutt is the duly elected, qualified and acting Governor of the State of Indiana and as such is a member of the Board of Department of Treasury of the State of Indiana. Defendant Floyd E. Williamson is a

duly appointed, qualified and acting member of the Board of Department of Treasury of the State of Indiana. The defendants Paul V. McNutt, William Storen and Floyd E. [fol. 52] Williamson together constitute the Board of Department of Treasury of the State of Indiana and as such are in charge of the Department of Treasury of the State of Indiana.

Defendant Philip Lutz, Jr., is the duly elected, qualified and acting Attorney General of the State of Indiana.

Defendants are the state officials charged with the duty of administering and enforcing the gross income tax act of 1933 hereinafter referred to, and of assessing, levying and collecting the taxes provided for therein.

3. Plaintiff is the owner of real and personal property located in said city and State and pays taxes levied thereon for state, municipal and local purposes; and if the certain law enacted by the General Assembly of the State of Indiana at its regular session held in 1933, known as the "Gross Income Tax Act of 1933" (Chapter 50 Acts 1933, page 388), hereinafter referred to, be valid and enforceable in any of its provisions as applied to the plaintiff, plaintiff will also be compelled to pay such taxes as are levied and assessed against it by the defendants in such amounts and in such manner as said act shall be construed and applied to the plaintiff by said defendants; and plaintiff brings this action in its own behalf and in a representative capacity in behalf of all other taxpayers, citizens and residents of Indiana or elsewhere who are similarly [fol. 53] situated.

4. Plaintiff is engaged in the business of manufacturing *av*rious kinds of machinery, tools, appliances and equipment for the construction, improvement, working, repair and maintenance of roads and highways. Plaintiff's only factory is located at Indianapolis in the State of Indiana. Plaintiff, as a manufacturer engaged in the business aforesaid, sells and disposes of its various products within the State of Indiana, and in other states and territories of the United States and in foreign countries, as follows:

(a) Plaintiff sells a substantial part of its products in quantities to independent distributors located in various states other than the State of ~~Indiana.~~ Such distributors resell said products to their own customers. Such distribu-

tors are not the agents of the plaintiff nor are they subject to plaintiff's control, but are in each case engaged in business on their own account as independent dealers. The products so sold to distributors are shipped from plaintiff's factory direct to such distributors in other states upon orders approved at the home office of plaintiff. Plaintiff also ships its products upon orders of the distributor, approved at the home office of plaintiff, direct from plaintiff's factory to purchasers from the distributor, all such shipments being made to states other than Indiana. Payments for all such products are made by the distributors direct [fol. 54] to the plaintiff at its home office in Indianapolis.

Since the first day of May, 1933, when the gross income tax law hereinafter referred to became effective, plaintiff has sold and delivered products to independent distributors and to purchasers from such distributors in the manner above stated, the entire gross income from which will be in excess of Fifteen Thousand Dollars ($15,000), of which the sum of Ten Thousand Six Hundred Sixty-two and 63/100 Dollars ($10,662.63) has been collected and received, and the remaining part will be collected and received as the same falls due; and plaintiff expects to and will in the regular course of its business sell further large quantities of its products in the manner aforesaid, and will during the current and succeeding taxable periods collect and receive further gross income therefrom in a substantial sum, the exact amount of which can not now be determined.

(b) Plaintiff sells a substantial part of its products to purchasers located in states other than Indiana through agents of the plaintiff who solicit and take orders in such states for said products. All such sales are made upon orders subject to approval at the home office of Plaintiff, and such products are shipped from plaintiff's factory direct to the purchasers in other states. Payments for said products are made to plaintiff at its home office in Indianapolis. A portion of such sales are to ultimate users, and [fol. 55] a portion of such sales are in quantities to dealers who resell such products.

Since the first day of May, 1933, plaintiff has sold and delivered products in the manner above stated to customers outside the State of Indiana, the entire gross income from which will be in excess of Five Thousand Dollars ($5,000), of which the sum of $1,453.84 has been collected and re-

ceived, and the remaining part will be collected and received as the same falls due; and plaintiff expects to and will in the regular course of its business sell further large quantities of its products in the manner aforesaid and will during the current and succeeding taxable periods collect and receive further gross income therefrom in substantial sums, the exact amount of which can not now be estimated.

Of the total amount of gross income received or to be received from sales to purchasers outside the State of Indiana in the manner aforesaid, an amount in excess of One Thousand Dollars ($1,000) has been received from purchasers who are ultimate users of the products sold to them.

(c) Plaintiff sells a substantial part of its products through its agents, on orders subject to approval at its home office, to purchasers in the Dominion of Canada and other foreign countries. All products so sold are shipped from plaintiff's factory direct to the purchasers in such foreign countries, and payment is made therefor at the [fol. 56] home office of the plaintiff in Indianapolis.

Since the first day of May, 1933, plaintiff has sold and delivered products to foreign countries as above described, the entire gross income from which will be in excess of One Thousand Five Hundred Dollars ($1,500), of which the sum of $1,385.00 has been collected and received, and the remaining part will be collected and received as the same falls due; and plaintiff expects to and will in the regular course of its business sell further large quantities of its products in the manner aforesaid and will during the current and succeeding taxable periods collect and receive further gross income therefrom in a substantial sum, the exact amount of which can not now be estimated.

(d) Plaintiff sells a part of its products through its agents to the Government of the United States, its departments or agencies, on orders approved at the home office of the plaintiff. Such products so sold are delivered to the United States Government, its departments or agencies in the various states of the United States, including the State of Indiana, as instructed by the Government at the time of sale.

Since the first day of May, 1933 plaintiff has sold and delivered products to the United States Government as

above stated, the entire gross income from which will be in excess of Two Thousand Dollars ($2,000), of which the sum of $1,509.12 has been collected and received and the [fol. 57] remaining part will be collected and received as the same falls due; and plaintiff expects to and will in the regular course of its business sell further quantities of its products in the manner aforesaid and will during the current and succeeding taxable periods collect and receive further gross income therefrom in a substantial sum, the exact amount of which can not now be estimated.

(e) Plaintiff sells a substantial portion of its products, and delivers the same direct from its factory, to purchasers within the State of Indiana. A portion of said products so sold in Indiana is sold to purchasers who are the ultimate users thereof, and the remaining portion thereof is sold to independent dealers who resell the same in Indiana and other states and foreign countries.

Since the first day of May, 1933, plaintiff has sold and delivered products in the manner above stated, the entire gross income from which will be in excess of Thirty-five Thousand Dollars ($35,000), of which the sum of $13070.53 has been collected and received and the remaining portion of which will be collected and received as the same falls due; and plaintiff expects to and will in the regular course of its business sell further quantities of its products in the manner aforesaid and will during the currect and succeeding taxable periods collect and receive further gross income therefrom in a substantial sum, the exact amount of which can not now be estimated.

[fol. 58] Of the total amount of gross income received or to be received from sales to purchasers within the State of Indiana, in the manner aforesaid, an amount in excess of $3176.53 has been received from purchasers who are ultimate users of the products sold to them.

(f) Plaintiff has each year during the four years immediately preceding the filing of this complaint received as gross income derived from its business conducted in interstate and foreign commerce, as above described in subparagraphs (a), (b) and (c) of paragraph 4 of this stipulation, an amount materially in excess of One Million Dollars, which gross income represents approximately eighty per cent of the entire gross income received by the plaintiff

from all sales of its products; and plaintiff estimates that its gross income from sales of its products made interstate and foreign commerce will continue to be a substantial portion of its entire gross income each year.

5. Plaintiff during certain seasons each year when all of its working capital is not represented in raw materials, work in process or completed products, regularly invests for temporary periods a substantial portion of its working capital in bonds, notes and other evidences of indebtedness issued by municipal corporations within the State of Indiana; all of which bonds, notes and other evidences of indebtedness bear interest, and by the statutes of Indiana in [fol. 59] force now and at the time of issuance of such bonds (b-ing Section 6 of an Act entitled "An Act concerning taxation, repealing all laws in conflict therewith and declaring an emergency, approved March 11, 1919", as amended by Chapter 191, Acts of 1923; Section 14037 Burns Indiana Statutes 1926) are declared to be exempt from taxation. When the business of plaintiff requires the return of such working capital to its manufacturing operations, such nontaxable securities are sold and converted into cash.

Plaintiff had acquired prior to February 27, 1933, and had in its possession on May 1, 1933, securities of the character above described, representing an investment of working capital of the plaintiff in excess of Two Hundred Thousand Dollars ($200,000). Since the first day of May, 1933, plaintiff has collected and received as interest earned and payable on such non-taxable obligations a total sum in excess of Two Thousand Five Hundred Dollars ($2,500). Since the first day of May, 1933, plaintiff has also collected and received as principal paid by the issuer at maturity of such non-taxable obligations a total sum in excess of One Hundred Thousand Dollars ($100,000.). Since May 1, 1933, plaintiff also has sold various of such nontaxable obligations for the purpose of converting them into cash for working capital, and from such sales has collected and received a total sum in excess of Ten Thousand Dollars ($10,000.).

[fol. 60] 6. Plaintiff had also acquired in the manner and for the purpose above described in paragraph 5 of this stipulation and is the owner and holder of One Hundred Thousand Dollars ($100,000) par value of bonds of the Fletcher Joint Stock Land Bank (at Indianapolis, Indiana), which bonds were issued pursuant to an Act of the Congress of the

United States which became a law July 17, 1916, (Chapted 245, 39 Stat. at Large 380, Sec. 26; U. S. C. A., Title 12, Secs. 641 and 931) and are by said Act declared to be instrumentalities of the United States and both as to principal and interest exempt from federal, state, municipal and local taxation. Since the first day of May, 1933, plaintiff has collected and received as interest earned and payable on such bonds the sum of Two Thousand Five Hundred Dollars ($2,500).

7. At its regular session in 1933 the General Assembly of the State of Indiana passed an act entitled "An Act to provide for the raising of public revenue by imposing a tax upon the receipt of gross income, to provide for the ascertainment, assessment and collection of said tax, and to provide penalties for the violation of the terms of this act, and declaring an emergency", which act was approved and became a law on February 27, 1933, and by its terms took effect and was in force from and after the first day of May, 1933, and is published as Chapted 50 at page 388 of the Acts of 1933, and is known and cited as the "Gross Income Tax Act of 1933".

[fol. 61] 8. Section 6(a) of said gross income tax act of 1933 provides that so much of a taxpayer's gross income as is derived from business conducted in commerce between the State of Indiana and other states of the United States, or between the State of Indiana and foreign countries, shall be excepted from taxation to the extent to which the State of Indiana is prohibited from taxing the same under the Constitution of the United States. Defendants and each of them are asserting that the Constitution of the United States does not in any way prohibit the levying of a tax upon gross income derived from business conducted in commerce between the State of Indiana and other states of the United States, or between the State of Indiana and foreign countries, and that plaintiff is required to file a return, and is liable to pay a tax at the rate prescribed in said act, upon the entire gross income of plaintiff, including that derived from interstate and foreign commerce as set forth in paragraphs 4(a), 4(b) and 4(c) of this stipulation.

Plaintiff asserts that under the Constitution of the United States, the State of Indiana is prohibited from levying a tax upon the gross income derived from plaintiff's commerce between the State of Indiana and other states of the

United States, and from levying a tax upon gross income derived from plaintiff's commerce between the State of Indiana and foreign countries, and, without the consent [fol. 62] of Congress, from laying any duties on articles exported by plaintiff to foreign countries, as set out in paragraphs 4(a), 4(b) and 4(c) of this stipulation and that the true intent of the General Assembly of Indiana in enacting said gross income tax act, and especially Section 6 (a) thereof, was to exempt from taxation as a part of the gross income of any taxpayer, the gross income derived from interstate and foreign commerce.

Plaintiff further asserts that if said act, when construed according to its true intent, impose a tax on the gross income of plaintiff derived from its business conducted as set forth in paragraphs 4(a), 4(b) and 4(c) of this stipulation, then said act is invalid and void for the reason that such tax constitutes a regulation of and a burden upon interstate and foreign commerce, and a duty upon exports without the consent of Congress, and is in violation of Section 8 and Section 10 of Article 1 of the Constitution of the United States. For the foregoing reasons the defendants and each of them are without authority to require plaintiff to file a return or to pay a tax upon the gross income derived from its business conducted as set forth in paragraphs 4(a), 4(b) and 4(c) of this stipulation, but defendants nevertheless are now asserting such right and declaring their intention to collect such tax.

9. Section 6(c) of said gross income tax act of 1933 [fol. 63] provides that so much of a taxpayer's gross income as is derived from sales to the United States Government, its departments or agencies, shall be excepted from taxation to the extent to which the State of Indiana is prohibited from taxing the same under the Constitution of the United States. Defendants and each of them are asserting that the Constitution of the United States does not in any way prohibit the levying of a tax upon gross income derived from sales to the United States Government, its departments or agencies, and that plaintiff is required to file a return and is liable to pay a tax at the rate prescribed in said act, upon the entire gross income of plaintiff, including that derived from sales to the United States Government, its departments or agencies, as set forth in paragraph 4 (d) of this stipulation.

Plaintiff asserts that under the Constitution of the United States, the State of Indiana is prohibited from levying a tax upon the gross income derived from plaintiff's sales to the United States Government, its departments or agencies, as set out in paragraph 4(d) hereof, and that the true intent of the General Assembly of Indiana in enacting said gross income act, and especially Section 6 (c) thereof, was to exempt from taxation as a part of the gross income of any taxpayer, the gross income derived from sales to the United States Government, its departments or agencies.

[fol. 64] Plaintiff further asserts that if said act, when construed according to its true intent, imposes a tax on the gross income of plaintiff derived from its sales to the United States Government, its departments or agencies, as set forth in paragraph 4 (d) hereof, then said act is invalid and void for the reason that such tax constitutes a regulation of and a burden upon the powers and functions of the United States Government and is in violation of the Constitution of the United States, and particularly of Section 8 of Article 1 thereof; and that for the foregoing reasons the defendants and each of them are without authority to require plaintiff to file a return or to pay a tax upon the gross income derived from its business conducted as set forth in paragraph 4 (d) of this stipulation, but defendants nevertheless are asserting such right and declaring their intention to collect such tax.

10. Plaintiff asserts that said gross income act of 1933 is invalid and void to the extent that a tax is levied upon (a) that part of the gross income of plaintiff which is derived from interest upon the tax exempt bonds, notes, and other evidences of indebtedness of municipal corporations within the State of Indiana and each of them described in paragraph 5 of this stipulation; (b) upon that part of the gross income of plaintiff which represents funds received upon maturities of any of such tax exempt obligations described in paragraph 5 of this complaint; and (c) upon [fol. 65] that part of the gross income of plaintiff which is derived from the sale of any of such tax exempt obligations described in paragraph 5 of this stipulation; for the reason that the tax upon such gross income impairs the obligation of the contracts existing between plaintiff and each of the municipalities or political subdivisions which issued the obligations, and in such respect, said act is in

conflict with Section 10 of Article 1 of the Constitution of the United States and with Section 24 of Article 1 of the Constitution of Indiana.

11. Plaintiff further asserts that said gross income tax act of 1933 is invalid and void to the extent that a tax is levied upon that part of the gross income of plaintiff which is derived from interest upon the tax exempt bonds of the Fletcher Joint Stock Land Bank as described in paragraph 6 of this stipulation, for the reason that the tax upon such gross income constitutes a tax upon an instrumentality of the United States and also impairs the obligation of the contract existing between the plaintiff and the issuer of said bonds, and in such respect said act is in conflict with Sections 8 and 10 of Article 1 of the Constitution of the United States and with Section 24 of Article 1 of the Constitution of Indiana.

12. Plaintiff's business is that of manufacturing, and the sale of its products is only an incident to such business. Plaintiff does not at its factory or home office, or at any [fol. 66] other place, maintain or operate any store, salesroom or other establishment for the business of wholesaling or retailing its products, or from which sales are made, but all of its products are sold only on orders accepted and approved at its home office, as set forth in paragraph 4 of this stipulation. Plaintiff asserts that it is not engaged in the business of wholesaling or jobbing as defined in Section 3 (b) of the act, nor in the business of retailing as defined in Section 3 (c), but is engaged only in the business of manufacturing as defined in Section 3 (a) of the act; and under said section, plaintiff's gross income is taxable only at the rate of one-fourth of one per cent, and no part of such gross income whether derived from the sale of products in quantities to dealers or distributors, or from the sale of single units to purchasers who are ultimate users of the same, is taxable at any other rate than that provided in said Section 3 (a) of the act. Notwithstanding the aforesaid, defendants and each of them are asserting the right to require the plaintiff to file a return and pay a tax under Section 3 (c) of said gross income tax act at the rate of one per cent upon that part of plaintiff's gross income which is derived from sales of its products to purchasers who are the ultimate users thereof.

13. Since the first day of May, 1933, when said gross income tax act became effective, the defendants and each of them have been and are promulgating rules and regula- [fol. 67] tions for the making of returns and for the ascertainment, assessment and collection of the tax imposed under such act, and have been and are issuing instructions and directions to plaintiff and other taxpayers as to the returns to be filed and the extent of the taxes to be paid by them under said act. Among such rules and directions defendants have announced and declared that the tax will be imposed upon the entire gross receipts, whether derived from sales within or without the State of Indiana, or whether in intra-state or interstate commerce, of every taxpayer engaged in the business of manufacturing and producing any article for sale; that the proceeds and earnings or interest received on bonds issued by the subdivisions of the State of Indiana and municipal bonds must be included in gross receipts for taxation; and that all gross receipts from sales made by a manufacturer to purchasers who are the ultimate users or consumers of the article sold will be taxed at the rate of one per cent.

14. In connection with and pursuant to such rules, regulations, instructions and directions, defendants have been and are now demanding that plaintiff file its return, and pay the taxes asserted by defendants to be collectible upon gross income received by plaintiff since May 1, 1933, and to be received by it during the current and succeeding taxable periods, as follows:

(a) Upon the gross income received by plaintiff in interstate and foreign commerce conducted as set forth in para- [fol. 68] graphs 4 (a), 4 (b) and 4 (c) and referred to in paragraph 8 of this stipulation;

(b) Upon the gross income received by plaintiff from sales of its products to the United States Government, its departments or agencies;

(c) Upon the gross income received by plaintiff from tax exempt securities, including interest collected thereon, principal collected on payment at maturity and proceeds from the sale of such securities, as set forth in paragraphs

5 and 6 and referred to in paragraph- 10 and 11 of this stipulation;

(d) Upon the gross income of all sales of products by the plaintiff, at the rate of one per cent provided in Section 3 (c) of said act, where the purchaser is the ultimate user thereof, as set forth in paragraphs 4 (b) and 4 (e) and referred to in paragraph 12 of this stipulation;

and said defendants and each of them have determined to enforce their said demands upon the plaintiff, and unless prevented by judgment and decree of this Court, will proceed to enforce such demands to the extent of invoking and inflicting the various civil and penal provisions of said act if plaintiff shall fail to comply with such demand.

15. By reason of the declared intention and determination of defendants to levy and collect taxes upon all portions of the entire gross income of plaintiff in the manner and to the extent above set forth in this stipulation, and [fol. 69] the contention of plaintiff as hereinabove stated that such levy and collection of the taxes claimed by defendants upon certain portions of plaintiff's gross income hereinabove referred to will be unlawful and invalid, an actual controversy exists between the plaintiff in its own behalf and in behalf of other taxpayers similarly situated and, the defendants hereto; and it is necessary that the rights, status and legal relations of the plaintiff and of the defendants to this proceeding in respect to the subject matter hereof be determined and declared by this Court.

(End of Exhibit No. 1.)

And the Plaintiff here rested.

And the Defendants here rested.

And this was all the evidence given in the cause.

[fols. 70-71] Reporter's certificate to foregoing transcript omitted in printing.

[fol. 72] IN SUPERIOR COURT OF MARION COUNTY

CERTIFICATE OF TRIAL JUDGE TO BILL OF EXCEPTIONS—Filed September 30, 1933

And be it Further Remembered, That the foregoing typewritten transcript of the evidence, so taken and reported, as aforesaid, contains all the evidence given and offered in said cause, with the objections and motions made thereto, the rulings of the Court on said objections and motions, and the exceptions taken thereto; and the same is now embodied in and made a part of a Bill of Exceptions; and on the 30th day of September, 1933, and within the time allowed by the Court so to do, the Defendants tendered and presented to said Judge of the Superior Court of Marion County, State of Indiana, Room No. 5, this, its Bill of Exceptions, which contains the typewritten transcript of all the evidence, so taken as aforesaid, with the objections and motions made thereto, the rulings of the Court on said objections and motions, and the exceptions taken thereto; and prays that the same may, by said Judge, be examined, approved, signed, sealed and caused to be filed and made a part of the record in this cause; all of which is accordingly done this 30th day of September, 1933, and the same, so examined, approved and found to be correct, is ordered to be certified by the Clerk of this Court, without copying, as a part of the record in this cause.

Russell J. Ryan, Judge of the Superior Court of Marion County, State of Indiana, Room No. 5.

[File endorsement omitted.]

[fol. 73] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 74] [File endorsement omitted]

IN SUPREME COURT OF INDIANA

#26401

WILLIAM STOREN, as Chief Administrative Officer of the Department of Treasury of the State of Indiana; Department of Treasury of the State of Indiana, Paul V. McNutt, William Storen, Floyd E. Williamson, as and Constituting the Board of Department of Treasury of the State of Indiana; Philip Lutz, Jr., as Attorney-General of the State of Indiana, Appellants;

vs.

J. D. ADAMS MANUFACTURING COMPANY, Appellee

Appeal from the Marion Superior Court, Room Five

ASSIGNMENT OF ERRORS—Filed November 21, 1933

The appellants, and each of them, say there is manifest [fol. 75] error in the judgment and proceedings in this cause, in this, to-wit:

1. The court erred in overruling the appellant's motion for a new trial.

For which errors Appellants, and each of them, pray that the judgment be in all things reversed.

Philip Lutz, Jr., Attorney General of Indiana; Fred A. Wiecking, Assistant Attorney General; Joseph P. McNamara, Deputy Attorney General, Attorneys for Appellants.

[fol. 76] IN SUPREME COURT OF INDIANA

[Title omitted]

APPELLANTS' BRIEF—Filed June 4, 1934

* * * * * * *

PROPOSITIONS, POINTS AND AUTHORITIES

Error Relied Upon for Reversal

[fol. 77] All propositions, points and authorities are brought under and addressed to Assignment of Errors No. 1; that the trial court erred in overruling the appellants' motion for a new trial. (Record, pp. 1 and 1a.)

* * * * * * *

Proposition II

The court erred in overruling the motion for a new trial for the reason that the imposition of the gross income tax upon interest derived from bonds of Indiana governmental units is not an impairment of contract and that said act is not in conflict of Section 10 of Article 1 of the Constitution of the United States of America or Section 24 of Article 1 of the Constitution of the State of Indiana.

NOTE.—This proposition is limited to the consideration of whether or not the interest from tax-exempt securities may be a part of the taxpayer's gross income for the reason that that was the only item concerning such bonds which was in controversy in the trial court.

Point 1

It is well to note that the three sections of Chapter 59 of the Acts of 1919, as amended by Chapter 191 of the Acts of 1923 (Burns' Annotated Indiana Statutes, 1926 Revision, Section 14037), which were relied upon by the appellee in the trial court as forming the basis for the exemption claim are Sections 20, 21 and 22. There is nothing contained in these sections which could be construed as an exemption of interest on the bonds therein referred to. [fol. 78] These sections are as follows:

"The following property shall be exempt from taxation. * * *:

Nineteenth. The real estate and personal property of any corporation which shall have established a public library as provided by law, which real estate and personal property shall be used exclusively for such library purposes.

Twentieth. All bonds, notes and other evidence of indebtedness hereafter issued by the State of Indiana or by municipal corporations within the state upon which the said state or the said municipal corporations pay interest shall be exempt from taxation.

Twenty-first. That all bonds hereafter authorized by any county or township in the State of Indiana for the purpose of building, constructing and paying for the construction of any free gravel, macadamized or other improved roads, shall be exempt from taxation: Provided, Said bonds shall not bear a greater rate of interest than five per cent interest per annum, payable semi-annually.

Twenty-second. All bonds and other evidences of indebtedness hereafter issued by or in the name of any municipality or other political or civil subdivision of the State of Indiana, or by or in the name of any taxing district in the State of Indiana, for the purpose of paying the cost of acquisition, construction, improvement or maintenance of streets, highways, drains, levees, parks, docks, waterways, boulevards, playgrounds, bridges, sewage, disposal plants [fol. 79] and other improvements of public benefit and which bonds or other evidences of indebtedness are payable from special assessments or special taxes, shall be exempt from taxation, unless otherwise expressly provided in this section."

Burns' Annotated Indiana Statutes, 1926 Revision, Sec. 14037.

It is submitted that no contract has been made by the State of Indiana not to include interest from bonds of state political subdivisions in the measure of excise taxes imposed by the State.

Point 2

It is well settled that where a State contracts to exempt from direct property taxes state bonds, as the sections relied upon by the appellee purport to do, it does not impair the obligation of contract to include the interest derived from the bonds in the measure of an excise tax imposed upon a

privilege, value of which is in part measured by gross income which includes interest derived from such bonds.

Orr v. Gilman, 183 U. S. 278, 288, 289.

Point 3

The rule governing exemption is that an intention upon the part of the General Assembly to grant an exemption from the taxing power of the State can never be implied, but must be expressed in clear and unmistakeable terms. This for the reason that when an exemption is claimed under a statute it is to be construed strictly against the taxpayer and in favor of the public as represented by the State. This rule should be given its full application in this [fol. 80] instance where the taxpayer is claiming to be exempt from the payment of a tax upon interest accruing from non-taxable obligations of political subdivisions of the State.

2 Cooley on Taxation (4th Ed.), Sec. 672;
M. E. Church v. Ellis, 38 Ind. 3;
Madison v. Fitch, 18 Ind. 33;
Indianapolis v. McLean, 8 Ind. 328;
Orr v. Baker, 4 Ind. 86.

Proposition III

The tax imposed by Chapter 50 of the Acts of 1933 is not an intent by the State of Indiana to regulate commerce among the several states and with foreign nations and is not repugnant to the provisions of Article 1, Section 8, of the Constitution of the United States.

Point 1

The tax imposed by Chapter 50 of the Acts of 1933 is a tax upon a privilege exercised wholly within the State of Indiana. Such a tax would not be repugnant as levying a tax in conflict with the commerce clause of the Federal Constitution.

American Mfg. Co. v. City of St. Louis, 250 U. S. 459.

Point 2

It is well to note that the tax imposed by this act is not only upon a privilege exercised wholly within the State of Indiana, but this privilege is measured by the value of the

articles manufactured. This for the reason that Chapter [fol. 81] 50 of the Acts of 1933 expressly exempts from its operation, by Section 1-f, that increment which accrues as a result of the sale in a State other than the State of manufacture. Section 1-f provides: "* * * That the term gross income shall not include cash discounts allowed or taken on sales. Nor freight prepaid by the taxpayer and repaid to him by the purchaser;"

The variable represented by the price of articles manufactured within the State, the contract for the sale of which is entered into within the State and the purchase price of which is paid within the State is the freight charge. The value of the articles in the plant can easily and properly be arrived at by deducting the freight charge to the place of delivery. Therefore we find this act by Section 1-f has affirmatively abstained from placing a tax upon the entire receipts accruing as the result of sales which form the basis of the plaintiff's case, and that whenever the words "gross income" are used in this act they have been defined by the specific provisions of the act itself as being the receipts less the only variable which results from dealings in any way connected with the transportation of the articles across state lines. This brings the case squarely within the rule that has been laid down by the Supreme Court in the cases of Hope Natural Gas Company v. Hall, 274 U. S. 284, 288; American Manufacturing Company v. City of St. Louis, 250 U. S. 459.

Point 3

Manufacturing, as is mining, is a local business; nor does the fact that the articles manufactured are to be after- [fol. 82] wards transported into or used in States other than the State of its production make it a part of such commerce.

United Mine Workers v. Coronado Coal Co., 259 U. S. 344, 66 L. Ed. 795;

Crescent Cotton Oil Co. v. State of Mississippi, 257 U. S. 129, 66 L. Ed. 166;

Heisler v. Thomas Colliery Co., 260 U. S. 245, 67 L. Ed. 237;

Oliver Iron Mining Co. v. Lord, 262 U. S. 172, 67 L. Ed. 929;

American Mfg. Co. v. City of St. Louis (C. C. A.), 8 Fed. (2d) 447;

Stratton's Independence v. Howbert, 231 U. S. 399, 415, 58 L. Ed. 285;
United Leather Workers International Union v. Herkert & M. Trunk Co., 265 U. S. 457, 68 L. Ed. 1104;
Del., Lack. & West. R. R. v. Yurkonis, 238 U. S. 439, 59 L. Ed. 1397.

Point 4

A state tax which imposes an excise upon a privilege purely intrastate measured, however, by an index determined through later sales in interstate commerce is not invalid.

American Mfg. Co. v. City of St. Louis, 250 U. S. 459;
Hope Natural Gas Co. v. Hall, 274 U. S. 284, 288;
Flint v. Stone Tracy Co., 230 U. S. 107;
Home Insurance Co. v. New York, 134 U. S. 594;
U. S. Express Co. v. Minnesota, 223 U. S. 335;
[fol. 83] Kansas City, F. S. & N. R. Co. v. Botkin, 240 U. S. 227, 60 L. Ed. 617;
Hump Hairpin Mfg. Co. v. Emmerson, 258 U. S. 290, 66 L. Ed. 622.

[fol. 84] In Supreme Court of Indiana

Marion S. C. #26401

William Storen, as Chief Administrative Officer of the Dept. of Treasury of the State of Ind. et al.

vs.

J. D. Adams Mfg. Co.

Judgment—April 30, 1937

Come now the parties by counsel and the Court, being advised in the premises, reverses the judgment of the court below with the following opinion pronounced by Fansler, J. (H. I.). Treanor, J. dissenting in part and concurring in part with an opinion (H. I.).

It is therefore considered by the Court that the judgment of the court below be reversed with instructions to enter

judgment for appellants as indicated by this opinion, at the cost of the appellees.

And it is further considered and adjudged by the Court that the appellant recover of the appellee the sum of $— for — costs in this behalf expended.

G. L. Tremain, Chief Justice.

[fol. 85] IN SUPREME COURT OF INDIANA

No. 26401

WILLIAM STOREN, as Chief Administrative Officer of the Department of Treasury of the State of Indiana; Department of Treasury of the State of Indiana; Paul V. McNutt, William Storen, Floyd E. Williamson, as and Constituting the Board of Department of Treasury of the State of Indiana; Philip Lutz, Jr., as Attorney-General of the State of Indiana, Appellants,

v.

J. D. ADAMS MANUFACTURING COMPANY, Appellee

Appeal from Superior Court, Marion County

OPINION—Filed April 30, 1937

FANSLER, J.:

Appellee brought this action seeking a declaratory judgment construing certain portions of the Gross Income Tax Act of 1933 (Acts 1933, c. 50, p. 388, Burns' Ann. St. 1933, § 64-2601 et seq.). The facts were stipulated and are not in dispute. There was a judgment for appellee.

The ruling on appellants' motion for a new trial is assigned as error.

[fol. 86] Appellee is an Indiana corporation, engaged in manufacturing machinery, tools, appliances, and equipment for the construction, improvement, and repair of roads and highways. Its home office, and principal place of business, and its only manufacturing plant, is located in the state of Indiana. It sells a substantial portion of its products to purchasers within the state, some to the ultimate user or consumer, and the remainder to dealers who resell. It sells a substantial portion of its products, through

selling agents or otherwise, to dealers in other states and in foreign countries. All sales made outside of the state are upon orders taken subject to the approval of the home office, shipment is made from the factory, and payment is made to the home office. Its receipts from business in other states and foreign countries, during each of the four years immediately preceding the trial, were in excess of $1,000,000, and amounted to approximately 80 per cent. of its entire gross income from the sale of its products. At certain seasons of each year it invests, for temporary periods, a substantial portion of its working capital in bonds or other obligations of municipal corporations within the state, which obligations are interest-bearing, and, by the statutes in force at the time of issuance, are exempt from taxation; and, since the 1st day of May, 1933, it has collected, as part of its gross income, interest on such obligations in excess of $2,500.

Upon these facts, the trial court held: "That said Gross Income Tax Act of 1933 does not by any of its terms or provisions authorize or require the assessment or collection of any tax upon the gross income derived by the plaintiff, [fol. 87] or others similarly situated, from business so conducted in commerce between the State of Indiana and other states of the United States or between the State of Indiana and foreign countries, but such gross income is by said act expressly excepted from such tax." It further held that, in so far as the act purports or attempts to impose a tax upon gross income, consisting of interest upon tax-exempt securities, it impairs the obligation of contracts, and is void under the state and federal Constitutions. It further found that the plaintiff was not engaged in any business except manufacturing, as defined in section 3 (a) of the act, and that the law does not by any of its terms authorize or require the assessment of any tax upon the gross income of appellee, or others similarly situated, derived from sales to ultimate users or consumers, at any other or different rate than one-fourth of one per cent., the rate which applies to manufacturers.

Three questions are presented: (1) Is that part of appellee's gross income, which is derived from sales of appellee's products to ultimate users, taxable at one per cent., the rate which applies to those engaged in the business of retailing, or at one-fourth of one per cent., the rate which applies to those engaged in the business of manufacturing?

(2) Is that part of appellee's gross income, derived from interest payments on tax-exempt bonds of municipal corporations of the state of Indiana, taxable? (3) Is that part of appellee's gross income, which is derived from the sale of its products in interstate and foreign commerce, taxable?

Section 3 of the act provides for a tax "upon the entire [fol. 88] gross income of every person engaged in the business of manufacturing" at the rate of one-fourth of one per cent., and "upon the entire gross income of every person engaged in the business of retailing" at the rate of one per cent.

It is appellee's contention that sale is an indispensable incident to the business of manufacturing and that whether a person is engaged in manufacturing is not determined by the manner in which he sells his goods, and that those engaged in manufacturing are, under the statute, taxable at the rate of one-fourth of one per cent. only, regardless of whether their sales are to jobbers, wholesalers, or at retail directly to the consumer. If this position can be sustained, it means that manufacturers, who operate exclusively through retail stores or stations and compete with retailers in the ordinary sense, have a discriminatory advantage by reason of the fact of manufacturing their own product. The goods sold by the ordinary retailer come down to him through a manufacturer, a jobber, and a wholesaler, and are burdened with one-fourth of one per cent. tax upon the manufacturer, the jobber, and the wholesaler, and one per cent. upon the retailer, a total of 1¾ per cent, while his competing retailer, who manufactures his own product, would pay but one-fourth of one per cent. There is nothing in the act which indicates a legislative design and intention to create such a discriminatory situation. The basic tax upon taxpayers generally is one per cent. Section 4 recognizes that the same person or corporation may be taxable upon different parts of his income at different rates, and provides that each person *person* shall be sub- [fol. 89] ject to taxation at the highest rate applicable to any part of his gross income unless he shall segregate the parts subject to different rates. Some reason can be seen for taxing manufacturers, jobbers, and wholesalers at a lower rate, since their merchandise moves in larger quantities and in greater price competition, and since the articles manufactured and sold by them must be ultimately bur-

dened with successive taxes. A manufacturer, as the term is commonly understood, is one who processes raw material "and stands between the original producer and the dealer." Indiana Creosoting Co. v. McNutt, Governor, et al. (Ind. Sup. 1936) 5 N. E. (2d) 310, 314.

The question of whether there would be a sufficient constitutional basis for classification and discrimination between those who manufacture their own merchandise, and other retailers, need not be considered, since no legislative intention to so discriminate is apparent, and a reasonable interpretation of the act precludes such a conclusion.

The rate does not depend upon the business in which the taxpayer is primarily engaged, but upon the activity from which each item of his gross income is received. Sales to ultimate consumers must be regarded as retail sales, whether made by the producer of the article sold or another.

The court erred in concluding that that part of the income of a manufacturer, which was received from sales at retail to the ultimate users, is not taxable at one per cent.

The bonds from which the income was received are specifically exempted from taxation, but there is no statutory [fol. 90] provision which exempts the interest from excise taxes which may be imposed by the state. In Orr v. Gilman (1902) 183 U. S. 278, 289, it was held by the Supreme Court of the United States: "That a transfer or succession tax, not being a direct tax upon property, but a charge upon a privilege exercised or enjoyed under the law of the State, does not, when imposed in cases where the property passing consists of securities exempt by statute, impair the obligation of a contract within the meaning of the Constitution of the United States." Upon the same reasoning, it does not offend against article 1, section 24, of the Constitution of Indiana. The gross income tax is not a tax upon property, but an excise upon a privilege. Miles et al. v. Department of Treasury et al. (1935) 209 Ind. 172, 199 N. E. 372.

The court erred in holding that that part of appellee's gross income, which consists of interest on tax-exempt bonds, is exempt from gross income tax.

It was held that section 6 (a) of the law excepts gross income derived from commerce between the several states and with foreign countries. Section 6, so far as it is pertinent, reads as follows: "There shall be excepted from the gross income taxable under this act: (a) So much of such

gross income as is derived from business conducted in commerce between this state and other states of the United States, or between this state and foreign countries, to the extent to which the State of Indiana is prohibited from taxing under the Constitution of the United States of America." This clause excepts such gross income only to the extent that taxation is forbidden by the Constitution, [fol. 91] and the act must be construed as contemplating a tax on all income that the state is permitted to tax. Courts will not prevent the carrying out of a legislative intention unless the Constitution clearly forbids. The act must be construed as levying the tax unless such a levy is violative of article 1, section 8, of the federal Constitution. Final jurisdiction of questions involving the federal Constitution is in the Supreme Court of the United States, and the principles announced in its decisions are controlling upon such questions. Any tax upon one engaged in interstate commerce is a burden upon interstate commerce, but all taxes are not illegal burdens. It is only where the tax is laid upon interstate commerce as such, or in such a manner as to discriminate against interstate commerce, that it is to be condemned. Those engaged in interstate commerce are not exempt from taxation by the states, and any tax that does no more than impose upon them or their property a reasonable share of the burdens of government will not be condemned. In passing on tax legislation, the court has looked beyond the form and language of the act, and its construction and characterization by the state courts, and determined its constitutionality in each instance from its practical operation and effect. This involves an examination of the law to ascertain the manner in which it operates and the effect upon the taxpayer.

It has been repeatedly held that a state tax, measured by gross receipts, which in effect does no more than burden the taxpayer engaged in interstate commerce with a fair share of the regular property taxes levied by the state, or its equivalent, cannot be condemned as violating the federal Constitution. But the decisions sustain the rights of the [fol. 92] state to levy excises against those engaged in interstate and foreign commerce, and therefore, while the cases refer to a fair share of the regular property taxes, they must be construed as establishing the rule that a statute will not be condemned if in effect it burdens those engaged in interstate commerce, only to the extent of their

just share of governmental burdens, under any reasonable method of general taxation.

The statute here under consideration levies a tax upon all who are domiciled within the state, based upon the privilege of domicile, and transacting business, and receiving gross income, within the state, and measured by the amount of gross income. The rate upon income derived from manufacturing, mining, producing minerals, oil, and gas, timber, and agricultural products, and from wholesaling and jobbing commodities, is one-fourth of one per cent. The rate for income derived from all other businesses or occupations, including income from the sales of real estate, and the performance of contracts, and from the investment of capital, and all receipts from all other sources whatsoever, is one per cent. It is thus seen to be a general tax, affecting all who are domiciled within the state who receive income, except those whose income is less than $1,000. There are other minor exemptions of the usual character. The provisions of the law are discussed in detail in Miles et al. v. Department of Treasury et al., supra, in which the law was held constitutional, and the tax an excise.

The statute was enacted concurrently with other legislation limiting levies upon property. The greater portion of the revenue raised goes back to local units of government [fol. 93] for the maintenance of schools and other activities otherwise dependent upon property levies. Legislative history indicates that one of the purposes of the Gross Income Tax Law was to redistribute governmental burdens and relieve property of a tax burden which was thought to be too great.

In support of its contention that the tax imposed is not repugnant to the commerce provision of article 1, section 8, of the Constitution of the United States, appellants assert that the case of American Manufacturing Co. v. City of St. Louis (1919) 250 U. S. 459, 462, 463, 464, 465, is decisive of the question. That case involved an ordinance of the city of St. Louis, imposing an excise tax upon manufacturers and merchants; the amount of the tax to be ascertained by, and proportioned to, the amount of sales of goods, whether sold within or without the state, and whether in domestic or interstate commerce. The ordinance was construed by the state Supreme Court as a license tax, graduated to accord to the amount of business carried on to the point of realizing profit or liquidation of loss by the sale of the product; that

the fixing of the amount of the tax by the amount realized upon sale of the goods is equitable; that it is a tax upon the manufacturer for the privilege of pursuing his business under the protection of the laws of the state and city ordinances, notwithstanding the amount of the tax is ascertained by the final sale price of the goods within or without the state. It is held that this construction by the Supreme Court of the state is conclusive, but that, "as has been held very often, the question whether a state law or a tax imposed thereunder deprives a party of rights secured by the federal Constitution depends not upon the form of the act, nor [fol. 94] upon how it is construed or characterized by the state court, but upon its practical operation and effect." It is said in the opinion:

"No tax has been or is to be imposed upon any sales of goods by plaintiff in error except goods manufactured by it in St. Louis under a license conditioned for the payment of a tax upon the amount of the sales when the goods should come to be sold. The tax is computed according to the amount of the sales of such manufactured goods, irrespective of whether they be sold within or without the State, in one kind of commerce or another; and payment of the tax is not made a condition of selling goods in interstate or in other commerce, but only of continuing the manufacture of goods in the City of St. Louis.

"There is no doubt of the power of the State, or of the city acting under its authority, to impose a license tax in the nature of an excise upon the conduct of a manufacturing business in the city. Unless some particular interference with federal right be shown, the States are free to lay privilege and occupation taxes. Clark v. Titusville, 184 U. S. 329; St. Louis v. United Railways Co., 210 U. S. 266, 276.

"The city might have measured such tax by a percentage upon the value of all goods manufactured, whether they ever should come to be sold or not, and have required payment as soon as, or even before, the goods left the factory. * * *

"In the outcome the tax is the same in amount as if it were measured by the sale value of the goods but imposed upon the completion of their manufacture. The difference is that, for reasons or practical benefit to the taxpayer, the city has postponed payment until convenient means have [fol. 95] been furnished through the marketing of the goods.

"In our opinion, the operation and effect of the taxing ordinance are to impose a legitimate burden upon the business of carrying on the manufacture of goods in the city; it produces no direct burden on commerce in the goods manufactured, whether domestic or interstate, and only the same kind of incidental and indirect effect as that which results from the payment of property taxes or any other and general contribution to the cost of government. Therefore, it does not amount to a regulation of interstate commerce. And, for like reasons, it has not the effect of imposing a tax upon the property or the business transactions of plaintiff in error outside of the State of Missouri, and hence does not deprive plaintiff in error of its property without due process of law.

"Our recent decisions cited in opposition to this view, Crew Levick Co. v. Pennsylvania, 245 U. S. 292, 297; Looney v. Crane Co., 245 U. S. 178, 188, and other cases of the same kinds referred to therein, are so obviously distinguishable that particular analysis is unnecessary."

It is said in Miles et al. v. Department of Treasury et al., supra, 209 Ind. 172, on page 188, 199 N. E. 372, 379: "We conclude that the tax in question is an excise, levied upon those domiciled within the state or who derived income from sources within the state, upon the basis of the privilege of domicile or the privilege of transacting business within the state, and that the burden may reasonably be measured by the amount of income. The reasoning which justified a tax upon the basis of domicile as readily supports and justifies a tax upon the basis of the right to receive income within, or transact business under the protection of, the state."

[fol. 96] The St. Louis ordinance discriminates against those most likely to be engaged in interstate commerce—manufacturers and merchants—since it lays a burden on them that is not laid on others, while the law under consideration lays a burden upon every person domiciled in the state who received a gross income. If there be discrimination, it is in favor of those likely to be engaged in interstate and foreign commerce, since they pay but one-fourth of one per cent, while other taxpayers pay one per cent. In other respects the differences in the law are in the form, the words, and not in the substance. The substantial difference that the law here is general and discriminates in favor of those engaged in interstate commerce, weighs in favor of

constitutionality. Both taxes, in so far as they affect commerce, are measured by the gross income from the sale of merchandise. Both, in practical operation and effect, exact a contribution to the support of government, measured by the gross income, for the privilege of transacting business under the protection of the local sovereign. Neither was designed nor intended as a regulation of, or a tax or burden upon, interstate commerce as such, or as a discrimination against those engaged in interstate commerce. If the tax here is to be condemned, while the St. Louis ordinance is upheld, it must be because of the form of the enactment and the words used. By amendment, manufacturers and merchants could be taken out of the Gross Income Tax Law, and, by a new enactment, following the language of the St. Louis ordinance, they could be burdened exactly as they are burdened here. It is clear from the decisions that, under such circumstances, a tax will not be condemned as unconstitutional. Other statutes, levying taxes to be measured by gross receipts, have been condemned, but always upon the [fol. 97] ground that they were discriminatory or that they levied a direct burden upon interstate or foreign commerce as such.

There are statements in U. S. Glue Co. v. Town of Oak Creek (1918) 247 U. S. 321, 326, 327, 328, 329, and Peck & Co. v. Lowe (1918) 247 U. S. 165, which have been considered as condemning taxes measured by gross income, merely because the amount of the tax is based upon gross income. Both opinions were written before the St. Louis Case above referred to, and, since a tax measured by gross income was there upheld, and taxes of the same character upheld in other cases, these decisions cannot have been so intended. The first case involved a net income tax of the state of Wisconsin; the second the federal net income tax. A general tax, measured by gross income, has never been passed upon by the Supreme Court of the United States, and no such tax was under consideration in the cases referred to. It must be concluded that the statements in those cases concerning gross income taxes were used as argument in defense of net income taxes, and not in condemnation of gross income taxes as such.

In U. S. Glue Co. v. Town of Oak Creek, supra, the court considered and sustained the Wisconsin Net Income Tax Law. The contention was that income derived from inter-

state commerce was not taxable. The tax was general, and not upon any particular business or calling. It is said in the opinion:

"It is settled that a State may not directly burden interstate commerce, either by taxation or otherwise. But a tax that only indirectly affects the profits or returns from such commerce is not within the rule. * * * (a) that the immunity of an individual or corporation engaged in inter- [fol. 98] state commerce from state regulation does not *not* prevent a State from imposing ordinary property taxes upon property having a situs within its territory and employed in interstate commerce; and (b) that the franchise of a corporation, although that franchise be the business of interstate commerce, is, as a part of its property, subject to state taxation, provided at least the franchise be not derived from the United States. * * *

"Yet it is obvious that taxes imposed upon property or franchises employed in interstate commerce must be paid from the net returns of such commerce, and diminish them in the same sense that they are diminished by a tax imposed upon the net returns themselves."

It is further said:

"The distinction between direct and indirect burdens, with particular reference to a comparison between a tax upon the gross returns of carriers in interstate commerce and a general income tax imposed upon all inhabitants incidentally affecting carriers engaged in such commerce, was the subject of consideration in Philadelphia & Southern S. S. Co. v. Pennsylvania, 122 U. S. 326, 345, where the court, by Mr. Justice Bradley, said: 'The corporate franchises, the property, the business, the income of corporations created by a State may undoubtedly be taxed by the State; but in imposing such taxes care should be taken not to interfere with or hamper, directly or by indirection, interstate or foreign commerce, or any other matter exclusively within the jurisdiction of the Federal government.' Many previous cases were referred to.

"The correct line of distinction is so well illustrated in two cases decided at the present term that we hardly need go further. In Crew Levick Co. v. Pennsylvania, 245 U. S. [fol. 99] 292, we held that a state tax upon the business of selling goods in foreign commerce, measured by a certain

percentage of the gross transactions in such commerce, was by its necessary effect a tax upon the commerce, and at the same time a duty upon exports, contrary to §§ 8 and 10 of Article 1 of the Constitution, since it operated to lay a direct burden upon every transaction by withholding for the use of the State a part of every dollar received. On the other hand, in Peck & Co. v. Lowe, ante, 165, we held that the Income Tax Act of October 3, 1913, c. 16, § 2, 38 Stat. 166, 172, when carried into effect by imposing an assessment upon the entire income of a corporation, approximately three-fourth of which was derived, from the export of goods to foreign countries, did not amount to laying a tax or duty on articles exported within the meaning of Art. 1, § 9, cl. 5 of the Constitution. The distinction between a direct and an indirect burden by way of tax or duty was developed, and it was shown that an income tax laid generally on net incomes, not on income from expor-ation because of its source, or in the way of discrimination, but just as it was laid on other income, and affecting only the net receipts from exportation after all expenses were paid and losses adjusted and the recipient of the income was free to use it as he chose, was only an indirect burden.

"The difference in effect between a tax measured by gross receipts and one measured by net income, recognized by our decisions, is manifest and substantial, and it affords a convenient and workable basis of distinction between a direct and immediate burden upon the business affected and a charge that is only indirect and incidental. A tax upon gross receipts affects each transaction in pro- [fol. 100] portion to its magnitude and irrespective of whether it is profitable or otherwise. Conceivably it may be sufficient to make the difference between profit and loss or to so diminish the profits as to impede or discourage the conduct of the commerce. A tax upon the net profits has not the same deterrent effect, since it does not arise at all unless a gain is shown over and above expenses and losses, and the tax cannot be heavy unless the profits are large. Such a tax, when imposed upon net incomes from whatever source arising, is but a method of distributing the cost of government, like a tax upon property, or upon franchises treated as property; and if there be no discrimination against interstate commerce, either in the admeasurement

of the tax or in the means adopted for enforcing it, it constitutes one of the ordinary and general burdens of government, from which persons and corporations otherwise subject to the jurisdiction of the States are not exempted by the Federal Constitution because they happen to be engaged in commerce among the States.''

It will be noted that the statement that property taxes are paid from net returns is not accurate, since an ordinary property tax must be paid whether there are net returns, or any returns, from the property. In Philadelphia & Southern Steamship Co. v. Pennsylvania, supra, 122 U. S. 326, on pages 344, 345, the court said of the tax:

''We do not think that it can properly be regarded as an income tax. It is not a general tax on the incomes of all the inhabitants of the state; but a special tax on transportation companies. Conceding, however, that an income tax may be imposed on certain classes of the community, distinguished by the character of their occupations; this is not an income tax on the class to which it refers, but a tax [fol. 101] on their receipts for transportation only. * * * It is unnecessary, therefore, to discuss the question which would arise if the tax were properly a tax on income. It is clearly not such, but a tax on transportation only.''

While it is true that in the Peck Case reference is made to the fact that the levy is upon the income net after all the expenses are paid and losses are adjusted, stress is put upon the fact that there is no discrimination, and that the tax is a general tax. A law which taxes the net income of persons engaged in foreign commerce, to the exclusion of all other persons, could not be upheld, notwithstanding the levy is effective only after expenses are paid and losses adjusted. Such a law would clearly be held invalid, since it would be directly discriminatory, and would not have the saving grace of being a general law affecting all persons, and thus the effect on commerce an incidental feature only. It must be concluded that the fact that the tax was general, and not discriminatory, controlled the decision. In the discussion in both net income tax cases, the court must have had in mind gross income tax laws affecting special classes, such as had been dealt with in the Philadelphia & Southern

Steam Ship Co. Case and the Crew Levick Co. Case, and not general gross income tax laws. It is true that: "A tax upon gross receipts affects each transaction in proportion to its magnitude and irrespective of whether it is profitable or otherwise." But it has never been denied, and has been expressly recognized, that general property taxes are a burden upon commerce, and that, especially where the value of the property is determined in whole or in part by gross receipts, the tax upon the property affects each transaction in proportion to its magnitude. Property taxes must be paid from the proceeds of the business if it is to continue, [fol. 102] and in ordinary accounting taxes are set up as a cost which must be taken into consideration in fixing selling prices, and it may be said, concerning an ordinary property tax, that: "Conceivably it may be sufficient to make the difference between profit and loss or to so diminish the profits as to impede or discourage the conduct of the commerce." A manufacturer or wholesaler, located in a city or state where property taxes are high, access to market being equal, cannot compete upon even terms with an equally equipped competitor located in a community where property taxes are exceptionally low. The difference may be slight, but it is an impediment. A tax of one-fourth of one per cent upon gross income may amount to no more than the difference in property taxes in a community where the taxes are high and another where taxes are low. If a given concern does $1,000,000 of export business, and earns a net profit of 5 per cent, or $50,000, the result is the same whether it is taxed at one-fourth of one per cent upon gross income or five per cent upon net income. Selling prices are fixed, to some extent at least, by competition and market resistance, and in either event the actual net income result is the same, and the actual burden upon the business is identical. It would seem therefore that the most cogent reasons given in the Peck Case, for supporting the net income tax law, are the fact that it is not discriminatory, and that it is a general tax. These are the reasons consistently given in support of property taxes, including those in which the value of the property for tax purposes is measured by gross income. All taxes are a burden, but those that have been condemned, as in Philadelphia & Southern Steamship Co. v. Pennsylvania, supra, and Crew Levick Co. v. Common-

[fol. 103] wealth of Pennsylvania, supra, were not general taxes laid upon all citizens, and they were on their face discriminatory against commerce.

It is said in Cudahy Packing Co. v. State of Minnesota (1918) 246 U. S. 450, 453: "On the other hand, if what is done is to reach the property and not to tax the gross earnings, the latter being taken merely as an index or measure of the value of the former, it well may be that the objection urged against the tax is untenable; for, as this court has said, 'by whatever name the tax or taxes may be called that are fixed by reference to the value of the property, if they are not imposed because of its use in interstate or foreign commerce, and if they amount to no more than would be legitimate as an ordinary tax upon the property, valued with reference to the use in which it is employed, they are not open to attack' as restraining or burdening such commerce."

It is said in many of the cases that, if a tax on gross income or gross revenue (and none of the cases deal with a general tax) is in lieu of other taxes on property, the tax is valid, but that if it is in addition to property taxes, and a tax upon the income, it is an undue and forbidden burden. But, according to the oft-repeated statements in the opinions that the name or character of the tax is of secondary importance, and that undue burden and discrimination is the primary thing, it will be seen that it is not important whether the tax is in fact a property tax or an excise. Pullman Co. v. Richardson, etc. (1923) 261 U. S. 330. It must therefore be asumed that the decisions were not intended to lay down the rule that a tax based upon gross income to be valid, must be a property tax, while a tax on net income may [fol. 104] be sustained although it is an excise. It seems clear from all the cases that the distinction lies in discrimination. In the Philadelphia & Southern Steamship Co. Case the tax was upon the gross income because it was derived from interstate commerce. A tax upon property, because it is used in interstate commerce, would likewise be condemned. It was held in Galveston, etc., R. Co. v. State of Texas (1908) 210 U. S. 217, that a tax, by whatever name, will be upheld if it amounts to no more than the ordinary tax on property or the just equivalent. In other words, if it is designed and intended only as the taxpayer's just share of the cost of government, and not as a burden upon, or discrimination against, interstate commerce, it will not be condemned. "Even interstate business must pay its way."

Postal-Telegraph Cable Co. v. City of Richmond (1919) 249 U. S. 252, 259. In Pullman Co. v. Richardson, etc., supra, 261 U. S. 330, on page 339, it was said, in sustaining the law: "There is no ground for thinking that it operates as a discrimination against interstate commerce." And in Bass, etc., Ltd., v. State Tax Commission (1924) 266 U. S. 271, 283, that the act was not a mere act "under the guise of legitimate taxation." In U. S. Glue Co. v. Town of Oak Creek, supra, it is said that a corporation engaged in interstate commerce is liable to ordinary taxes, and in Shaffer v. Carter, State Auditor, et al. (1920) 252 U. S. 37, that the states have full power to tax their people and their property. It is said in Matson Navigation Co. et al. v. State Board of Equalization, etc., et al. (No. 346, March 2, 1926) — U. S. —, that: "Unquestionably annual profits, gains or net income derived from business done within the State is an indication sufficiently significant to be deemed a reasonable base on [fol. 105] which to compute the value of that use." The case involved corporate franchises, but it is unquestionably true also that annual profits, gains, or net income have sufficient significance to be deemed a reasonable basis for taxation of citizens generally. No reason is pointed out why gross income is not in the same category, and in Miles et al. v. Department of Treasury et al., supra, it was held to have sufficient significance to be a reasonable basis for a tax upon residents of the state generally. If business is done, there is a burden upon the facilities of government without regard to whether there is profit. The state functions for those who make a profit and for those who do not. Governmental instrumentalities are not designed to guarantee a profit. The state serves both, those who profit and those who do not. Why one who manufactures and sells *a* $1,000,000 of machinery in this state and makes no profit should be exempt from taxation, while his competitor who manufactures and sells a like amount and makes a profit should be compelled to pay, is not clear.

There is nothing in the cases that condemns a non-discriminatory gross income tax if it does nothing more than burden corporations engaged in interstate commerce with ~~their~~ proper share of the burdens of the government under which they conduct their operations. The tax under consideration here is general. It not only does not discriminate against those engaged in interstate commerce, but seems to discriminate in their favor. It may be assumed that

most taxpayers engaged in interstate commerce are manufacturers and wholesale dealers in merchandise. They are taxed at the rate of one-fourth of one per cent on their gross incomes. The taxpayer generally is taxed at the rate of one per cent of his gross income.

[fol. 106] In Miles et al. v. Department of Treasury et al., supra, 209 Ind. 172, on pages 191, 192, 199 N. E. 372, 380, 381, it is said: "The lower rate is imposed upon those whose activities bring, or are likely to bring, them in competition with residents of other states, and who are subject to such competition within the state of Indiana as well as without. Any tax measured by the extent of the business activities of such persons handicaps them in their activities. It is within the scope of legislative power in levying taxes to vary rates upon considerations of public policy, and, if upon the theory that to do otherwise might tend to discourage given industries, it may put a lighter burden upon them so long as all in like circumstances are treated alike."

It is well settled that, if any state of facts reasonably can be conceived that will sustain a law, the existence of that state of facts must be assumed, and the burden is upon him who assails the law to show injury in the facts. There is no discrimination under this law between manufacturers and wholesalers residing in the state, and, in so far as those engaged in interstate and foreign commerce are concerned, it must be assumed that their competitors in other states and in foreign countries "bear their proper share of the burdens of the government under whose protection they conduct their operations."

The purpose of the Gross Income Tax Law was to broaden the basis of taxation and to relieve property of some of the burden of maintaining the government. It was purposed to reach those who paid little or no property tax and who received benefits or potential benefits from the instrumentalities of the government for which they did not carry a proportionate share of the burden. Property-owner taxpayers on [fol. 107] the whole are benefited. Some property owners, though their property tax is lightened, may pay a larger proportion of taxes because of the gross income tax, some may pay less, but it is clear that the owner of a given amount of property, who conducts a large manufacturing business in the state, puts more burden or potential burden upon the instrumentalities of government, maintained and standing by for his protection, than one with a like amount of prop-

erty who conducts a smaller business, regardless of whether the products of the business are sold within or without the state.

Whether the combined property and gross income tax of appellee is more than its property tax before the enactment of the Gross Income Tax Law does not appear, nor is it material. The action is brought by appellee for its own benefit and for those in like situation, which we assume to mean those who are engaged in interstate or foreign commerce, including farmers who sell their livestock and other produce outside the state. Whether each individual will now pay more or less tax than before will be governed by the amount of taxable property owned in proportion to gross income, and by the location of the property, since taxes for local purposes vary in different communities and in different years. Such unusual expenses of government as poor relief, in connection with the high rate of tax delinquency during depression years, tended to increase property tax rates in some communities, but such current fluctuations or differences due to temporary local conditions, or the variation in the amount of the total taxes collected for governmental purposes, cannot control or affect the result. The evident legislative purpose was to levy a tax generally [fol. 108] without discrimination against those who were engaged in whole or in part in interstate commerce. It was the purpose to broaden the tax bases in order to relieve appellee's property, and the property of all others, of what the Legislature considered an unjust burden. If appellee was not relieved of property taxes to the extent of its new burden under the Gross Income Tax Law, it is due to circumstances over which the Legislature could exert no control, since many pay taxes on gross income who paid little or no taxes on property; and, since the total taxes collected were approximately the same as before, it is obvious that property owners generally are paying no more in property and gross income taxes, but are paying less property taxes than formerly. It cannot be said that the tax is designed to, or that it does, levy upon appellee and others engaged partly in interstate or foreign commerce more than their fair proportionate share of the expense of maintaining the government under which they conduct their business.

Appellee contends that the tax upon gross income is not the same as a tax upon the value of manufactured goods,

since "there are many manufacturers, wholesalers, and merchants in Indiana whose goods are shipped almost entirely by express, parcel-post, truck or freight not prepaid, and hundreds of them, including appellee, who sell their goods in other states at a delivered price which takes into account handling, transportation, and other costs incidental to the interstate character of the business; and in every such case, the gross income tax levied on such gross receipts constitutes a direct tax and burden upon interstate commerce."

Clause (f) of section 1 of the act provides: "That the term 'gross income' shall not include cash discounts allowed [fol. 109] and taken on sales; nor freight prepaid by the taxpayer and repaid to him by the purchaser; goods, wares or merchandise, or the value thereof, returned by customers when the sale price is refunded either in cash or by credit; nor the sale price of any article accepted as part payment on any new article sold, if and when the full sale price of the new article is included in the 'gross income' subject to taxation under this act." The question of transportation charges included in the amount of sales, which is a basis for a determination of the tax, is not discussed in the St. Louis Case, but it is clear that here the Legislature endeavored to exclude transportation charges and other receipts of cash income which do not come to the taxpayer on account of the value of his merchandise. If, as contended, there are manufacturers, wholesalers, and merchants, who sell their goods at a delivered price outside of the state, including handling and transportation charges in the price of the goods, so that thus the handling and transportation charges become a part of their gross income upon which they are taxed, the remedy is in their own hands. They may at their option price their goods at the factory, or their place of business, and add the transportation costs. One can hardly complain of a law under which he is only burdened at his option.

The court erred in holding that the law does not authorize or require the assessment of the tax upon the gross income of appellee, and others similarly situated, derived from business conducted in interstate and foreign commerce.

Judgment reversed, with instructions to enter judgment for appellants, as indicated by this opinion.

[fol. 110] [File endorsement omitted.]

[fol. 111] IN SUPREME COURT OF INDIANA

[Title omitted]

DISSENTING OPINION—Filed April 30, 1937

TREANOR, J. Dissenting:

I concur with the first two holdings of the Court, namely (1) that that part of appellee's gross income which is received from sales to the ultimate users of appellee's products is taxable at one per cent, and (2) that the imposition of a gross income tax on interest derived from tax exempt bonds of municipal corporations does not impair the obligation of contract. I dissent from the holding and the reasoning supporting it, that a tax imposed upon gross income of appellee derived from interstate and foreign commerce, is not repugnant to the commerce provision of Article 1, Section 8 of the Constitution of the United States under the law as announced by the Supreme Court of the United States.

[fol. 112] In appraising the reasoning and decisions of the Supreme Court of the United States on this question, it is necessary to keep in view a few fundamental, and guiding rules which the Supreme Court of the United States has consistently applied when considering the question of whether a particular tax law, or tax scheme, of a state violates the interstate commerce clause of the Federal Constitution. It is obvious at the outset that no state tax law ever purports to regulate commerce among the states. Consequently it is the effect of the imposition of the tax burden which determines whether the particular tax law is such that it can be said to constitute a regulation of commerce among the states. No state, under our Federal Constitution, has the power to regulate commerce among the states, and, consequently, if the actual effect of the imposition of a particular tax burden constitutes a regulation of interstate commerce, the statute imposing the burden is invalid. On the other hand the Supreme Court of the United States consistently has recognized that if it is within the power of a state to impose a tax burden upon a particular subject of taxation, the imposition of such a tax burden is not obnoxious to the interstate commerce clause simply because there may be some indirect burden falling upon transactions

which fall within the category of commerce among the states.

In determining whether or not the burden imposed by a state tax law constitutes a regulation of interstate commerce the Supreme Court of the United States has held undeviatingly that it is a regulation of commerce if it imposes a direct burden upon such commerce; and has repeatedly stated that a tax measured by the gross receipts, arising [fol. 113] from interstate business, is such a burden as it is "by its necessary effect a tax upon such commerce, and therefore a regulation of it."[1] In so holding the Supreme Court has taken the view that any action by a state which directly interfer-s with free flow of commerce among the states by obstructing or burdening such flow of commerce is in legal contemplation a regulation of it. Consistently with that view the rule frequently has been stated that a tax upon gross receipts from interstate commerce is in violation of the commerce clause.

On the other hand the United States Supreme Court has held consistently that if a tax imposed is upon a subject of taxation, in respect to the taxing of which the state has untrammeled power, such tax does not offend against the commerce clause even though the effect upon the business of particular individuals or corporations may be such as to ultimately and indirectly affect their interstate transactions. In accordance with the latter view excise taxes, or taxes upon property, have been held not to violate the commerce clause even though the gross income of individuals and corporations derived from interstate transactions is used as one of the elements in determining the value of the privilege or the property which is subjected to the tax.

Appellant relies strongly upon the case of American Manufacturing Company v. City of St. Louis.[2] The tax in that case was held to be an excise tax upon the privilege of engaging in the business of manufactiring; and it was pointed out that gross income or receipts served as a measure of value of the privilege which was subjected to the excise tax. The tax had been imposed by the City of St. Louis under an act of the Missouri Legislature which [fol. 114] authorized that city to "license, tax and regulate

[1] Crew Levick Co. v. Pennsylvania, (1917) 245 U. S. 292.

[2] (1918) 250 U. S. 459.

* * * the occupation of merchants and manufacturers, and to graduate the amount of annual license imposed upon them in proportion to the sales made by such merchant or manufacturer during the year next preceding any fixed date."

To bring the instant case within the holding in the American Manufacturing Company v. City of St. Louis it would be necessary to construe the Gross Income Tax Act as imposing a privilege tax upon the occupation of manufacturing. It is clear that the General Assembly, in the exercise of the taxing power of Indiana, can impose such a tax. But I am convinced that appellee is correct in its contention that our present Gross Income Act does not impose a tax upon the privilege of engaging in the business of manufacturing. In so far as the tax in question may be considered a privilege tax, it must be treated as a tax upon the privilege of receiving gross income. In the title of the Act the tax which is being imposed is called "A tax upon the receipt of gross income;" and in Section 2 it is declared that the tax imposed is to be "measured by the amount or volume of gross income;" and that "such tax shall be levied upon the entire gross income of all residents. * * *" It was stated by this Court in Miles v. Department of Treasury,[3] "that the tax in question is an excise, levied upon those domiciled within the state or who derive income from sources within the state, upon the basis of the privilege of domicile or the privilege of transacting business within the state, and that the burden may reasonably be measured by the amount of income."

Appellant relies upon Section 1-f of the Gross Income Tax Act to support his contention that the tax is "not only upon a privilege exercised wholly within the State of Indi-
[fol. 115] ana, but this privilege is measured by the value of the articles manufactured." The particular provision relied upon is as follows: "'That the term gross income shall not include cash discounts allowed or taken on sales. Nor freight prepaid by the taxpayer and repaid to him by the purchaser * * *.'" Appellant urges that by the foregoing provision the words "gross income" are, in effect, defined to mean the value of the manufactured products at the plant. I cannot attach any such significance to the provision quoted. I think the plain intent of the language

[3] (1935) 199 N. E. 372, 374, — Ind. —.

quoted from Section 1-f is to prevent the inclusion in gross income of certain items which in reality form no part of ones gross income. This is more apparent when one reads all of Section 1-f.

It is my opinion that the tax imposed by our Gross Income Act is a tax upon gross income or gross receipts. And consequently, appellants third proposition reduces itself to the question of whether that part of appellee's gross income which is derived from the sale of its products in interstate and foreign commerce is taxable under the Constitution of the United States of America. And if such part of appellee's gross income is not taxable under the Constitution of the United States, then it is not taxable by our Gross Income Tax Act which expressly exempts "so much of such gross income as is derived from business conducted in commerce between this State and foreign countries, to the extent to which the State of Indiana is prohibited from taxing under the Constitution of the United States of America."[4] Therefore, the answer to the third question as presented by this appeal must be found in the decisions of the Supreme Court of the United States.

[fol. 116] By Article 1, Sec. 9 of the United States Constitution Congress is denied the power to levy any tax or duty "on articles exported from any state." And in the case of Peck & Co. v. Lowe,[5] the Supreme Court was required to determine whether Section 9 was violated by a congressional act which levied a tax upon the net income derived from export sales. In reaching the conclusion that Section 9 was not violated the Supreme Court emphasized the fact that the tax was levied upon net income. The thought of the Court is expressed in the following: "The words of the act are 'net income arising or accruing from all sources.' There is no discrimination. At most, exportation is affected only indirectly and remotely. The tax is levied after exportation is completed, after all expenses are paid and losses adjusted, and after the recipient of the income is free to use it as he chooses. Thus what is taxed—the net income—is as far removed from exportation as are articles intended for export before the exportation begins.

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[4] Sec. 6(a) Gross Income Tax Act, 1933, Ch. 50.

[5] (1917) 247 U. S. 165, 174-75.

If articles manufactured and intended for export are subject to taxation under general laws up to the time they are put in course of exportation, as we have seen they are, the conclusion is unavoidable that the net income from the venture when completed, that is to say, after the exportation and sale are fully consummated, is likewise subject to taxation under general laws. In that respect the status of the income is not different from that of the exported articles prior to the exportation."

In Crew Levick Co. v. Pennsylvania,[6] the United States Supreme Court had before it "The bare question * * * whether a state tax imposed upon the business of selling goods in foreign commerce, in so far as it is measured [fol. 117] by the gross receipts from merchandise shipped to foreign countries, is in effect a regulation of foreign commerce or an impost upon exports, within the meaning of the pertinent clauses of the Federal Constitution." The Court concluded, p. 295-96, that the "imposition of a percentage upon each dollar of the gross transactions in foreign commerce" was "by its necessary effect a tax upon such commerce, and therefore a regulation of it; and, for the same reason" was "in effect an impost or duty upon its exports."

The two foregoing cases furnished the grounds of decision for the United States Supreme Court in the later case of United States Glue Co. v. Oak Creek.[7] The question before the Court in that case was "whether a State, in levying a general income tax upon the gains and profits of a domestic corporation, may include in the computation the net income derived from transactions in interstate commerce without contravening the commerce clause of the Constitution of the United States." The Supreme Court assumed that the answer to the question depended upon whether the tax in question imposed a direct or indirect burden upon interstate commerce; and found the correct line of distinction illustrated in Crew Levick Co. v. Pennsylvania and Peck & Co. v. Lowe, supra. The following excerpts are from the opinion in U. S. Glue Co. v. Oak Creek, supra, pp. 328, 329.

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[6] (1917) 245 U. S. 292, 295.

[7] 247 U. S. 321, p. 326.

"The difference in effect between a tax measured by gross receipts and one measured by net income, recognized by our decisions, is manifest and substantial, and it affords a convenient and workable basis of distinction between a direct and immediate burden upon the business affected and [fol. 118] a charge that is only incidental. A tax upon gross receipts affects each transaction in proportion to its magnitude and irrespective of whether it is profitable or otherwise. Conceivably it may be sufficient to make the difference between profit and loss, or to so diminish the profit as to impede or discourage the conduct of the commerce. A tax upon the net profits has not the same deterrent effect, since it does arise at all unless a gain is shown over and above expenses and losses, and the tax cannot be heavy unless the profits are large."

* * * * * * *

"And so we hold that the Wisconsin income tax law, as applied to the plaintiff in the case before us, can not be deemed to be so direct a burden upon plaintiff's interstate business as to amount to an unconstitutional interference with or regulation of commerce among the States. It was measured not by the gross receipts, but by the net proceeds from this part of plaintiff's business, along with a like imposition upon its income derived from other sources, and in the same way that other corporations doing business within the State are taxed upon that proportion of their income derived from business transacted and property located within the State, whatever the nature of their business."

Under the holding in Crew Levick Company v. Pennsylvania, supra, and the reasoning in the two cases of U. S. Glue Company v. Oak Creek and Peck & Co. v. Lowe, supra, it must be concluded that a tax upon that part of appellee's [fol. 119] income which is received from its sales in interstate and foreign commerce would constitute a direct burden upon interstate and foreign commerce, and that such a tax would violate the interstate and foreign provision of the United States Constitution as construed by the Supreme Court of the United States. And consequently it is my opinion that the legislative intent, as clearly expressed in Section 6 (a) of the Gross Income Tax Act, is not to impose a tax upon that part of appellee's gross income which

is derived from sales transactions in interstate and foreign commerce.

It is my opinion that the trial court was not in error in deciding that the Gross Income Tax Act does not impose a tax upon that part of appellee's gross income which is derived from sales in interstate and foreign commerce.

[fol. 120] [File endorsement omitted.]

[fol. 121] IN SUPREME COURT OF INDIANA

[Title omitted]

[fol. 122] APPELLEE'S PETITION FOR REHEARING—Filed June 28, 1937

J. D. Adams Manufacturing Company, appellee in the above-entitled cause, respectfully petitions the Court to grant a rehearing in said cause for the reason that the Court erred in its opinion, decision and judgment rendered April 30, 1937, in the following, to-wit:

1. The Court erred in holding that the Gross Income Tax Act of 1933 applies to and validly levies a tax upon the gross income or receipts of appellee and others similarly situated, derived from business conducted in commerce between the State of Indiana and other states of the United States or between the State of Indiana and foreign countries, since such Act (a) by the clear wording of its provisions was not intended to apply to gross income or receipts from such commerce, and (b) if so applied and construed, would contravene and be repugnant to Article 1, Section 8 and Section 10 of the Constitution of the United States, and would be an undue burden on interstate and foreign commerce in contravention of said constitutional provisions.

2. The Court erred in holding that the Gross Income Tax [fol. 123] Act of 1933 is not repugnant to Article 1, Section 8 and Section 10 of the Constitution of the United States as applied to gross income or receipts of appellee and others similarly situated, derived from commerce among the several states of the United States and with foreign countries, and that said Act is valid and applicable to the gross

income or receipts of appellee and others similarly situated, derived from such commerce.

3. The Court erred in holding that the Gross Income Tax Act of 1933 is not repugnant to Article 1, Section 10 of the Constitution of the United States as applied to the gross income or receipts of appellee and others similarly situated, from interest received on bonds of Indiana municipal corporations held by appellee, and others similarly situated, and issued prior to May 1, 1933; in holding that said Act did not impair the obligation of contract exempting such bonds from taxation; and in holding that said Act is valid and does apply to such interest receipts.

4. The Court erred in holding that the Gross Income Tax Act of 1933 is not repugnant to Article 1, Section 24 of the Constitution of Indiana as applied to the gross income or receipts of appellee and others similarly situated, from interest received on bonds of Indiana municipal corporations held by the appellee and issued prior to May 1, 1933; in holding that said Act does not impair the obligation of contract exempting such bonds from taxation; and in holding that said Act is valid and does apply to such interest receipts.

5. The Court erred in holding that the gross income or receipts of appellee and others similarly situated, derived [fol. 124] from the sale of its products to ultimate users is taxable at the rate of one per cent (1%) under the provisions of Section 3(c) of the Gross Income Tax Act of 1933 instead of at the rate of one-fourth of one per cent (¼%), as provided in Section 3(a) of said Act.

Respectfully submitted, Frederick E. Matson, Attorneys for Appellee. Baker & Daniels, Bamberger & Feibleman, Schortemeier, Eby & Wood, White, Wright & Boleman, Matson, Ross, McCord & Clifford, of Counsel.

[fol. 125] [File endorsement omitted.]

[fol. 126] IN SUPREME COURT OF INDIANA

[Title omitted]

ORDER DENYING PETITION FOR REHEARING—September 20, 1937

Come now the parties by counsel and the Court, being advised in the premises, denies appellee's petition for a rehearing heretofore filed herein.

Treanor, J., dissents.

Michael L. Fansler, Chief Justice.

[fol. 127] [File endorsement omitted]

IN SUPREME COURT OF INDIANA

[Title omitted]

Petition for Appeal, Assignment of Errors, and Prayer for Reversal—Filed November 29, 1937

To the Chief Justice of the Supreme Court of the State of Indiana:

PETITION FOR APPEAL

The petitioner, J. D. Adams Manufacturing Company, a corporation, respectfully shows that it is the appellee in the above-entitled cause, on its own behalf and on behalf of all [fol. 128] other persons similarly situated; that the Supreme Court of Indiana rendered a final decision in said cause on the 20th day of September, 1937; that said Supreme Court is the highest court of said State in which a decision in this suit can be had; that in said cause there is drawn in question the validity of a statute of Indiana on the ground that said statute is repugnant to the Constitution and laws of the United States, and the decision is in favor of its validity; and that the petitioner considers itself aggrieved by said final decision.

Wherefore, the petitioner prays that an appeal be allowed from this Court to the Supreme Court of the United States and that the appeal bond herewith tendered by the petitioner be approved.

ASSIGNMENT OF ERRORS

The petitioner, J. D. Adams Manufacturing Company, appellee in the above entitled cause, and as appellant on appeal to the Supreme Court of the United States from the final decision and judgment heretofore entered herein, on its own behalf and behalf of all others similarly situated, assigns as error the following:

1. The Supreme Court of Indiana erred

a. in holding that the Gross Income Tax Act of 1933 (Ch. 50, Indiana Acts 1933; Ind. Stat. Ann. (Burns) 1933, Sec. 64-2601, et. seq.) is valid as applied to gross receipts of appellant and others similarly situated derived from business conducted in interstate and foreign commerce, and that the tax imposed by such Act on such gross receipts is not invalid as constituting an illegal burden on such commerce [fol. 129] and an impost or duty upon exports, in conflict with Article I, Section 8 and Section 10 of the Constitution of the United States;

b. in refusing to hold that said Act when applied to gross receipts of appellant and others similarly situated derived from commerce among the several states and with foreign nations, is repugnant to Article I, Section 8 and Section 10 of the Constitution of the United States as imposing an illegal burden upon such commerce and a duty or impost upon exports; and

c. in reversing the judgment of the trial court, and holding that said Act is valid and authorizes and requires the assessment and collection of the tax upon the gross receipts of appellant, and others similarly situated, derived from business conducted in interstate and foreign commerce.

2. The Supreme Court of Indiana erred

a. in holding that the Gross Income Tax Act of 1933 (Ch. 50, Indiana Acts 1933; Ind. Stat. Ann. (Burns) 1933, Sec. 64-2601, et seq.), in imposing a tax upon gross receipts of appellant and others similarly situated derived from interest on tax-exempt bonds of Indiana municipal corporations issued prior to the effective date of the Act, does not impair the obligation of the statutory contract existing between the issuing municipalities and the holders of such

[fols. 130-131] bonds, in conflict with Article I, Section 10 of the Constitution of the United States;

b. in refusing to hold that said Act, as applied to the gross receipts of appellant and others similarly situated consisting of interest on tax-exempt bonds issued by Indiana municipalities prior to the effective date of the Act, impairs the obligation of contract with the owners of such bonds and is repugnant to Article I, Section 10 of the Constitution of the United States; and

c. in reversing the judgment of the trial court, and holding that said Act is valid and authorizes and requires the assessment and collection of the tax upon the gross receipts of appellant, and others similarly situated, derived from interest on such tax-exempt bonds.

PRAYER FOR REVERSAL

For which errors J. D. Adams Manufacturing Company, a corporation, as appellant on said appeal, on its own behalf and in a representative capacity in behalf of all other taxpayers, citizens and residents of Indiana or elsewhere who are similarly situated, prays that the said judgment of the Supreme Court of Indiana finally rendered on September 20, 1937, in the above-entitled cause be reversed and a judgment ordered in favor of appellant and for costs.

Dated this 29th day of November, 1937.

Frederick E. Matson, Harry T. Ice, Attorneys for Appellant.

[fol. 132] IN SUPREME COURT OF INDIANA

[Title omitted]

ORDER ALLOWING APPEAL—Filed November 29, 1937

The petition of J. D. Adams Manufacturing Company, appellee in the above-entitled cause, for an appeal in said cause, on its own behalf and in a representative capacity in behalf of all other taxpayers, citizens and residents of Indiana or elsewhere who are similarly situated, to the Supreme Court of the United States from the judgment of [fol. 133] the Supreme Court of Indiana, having heretofore been filed with the Clerk of this Court and presented

herein and accompanied by assignment of errors, prayer for reversal of the judgment, an appeal bond, and a statement as to jurisdiction, all as provided by the statutes and the Rules of the Supreme Court of the United States, and the record in this cause having been considered and the decision therein to be appealed from constituting a final judgment of the highest court in the State in which a decision in said suit can be had, and it appearing that in this cause there is drawn in question the validity of a statute of the State of Indiana on the ground that it is repugnant to the Constitution of the United States, and said decision being in favor of the validity of such statute;

It is Therefore Ordered that an appeal be and hereby is allowed to the Supreme Court of the United States as prayed for in said petition, and the Clerk of the Supreme Court of Indiana is hereby ordered and directed within forty days from this date to make and transmit to the Clerk of the Supreme Court of the United States under his hand and the seal of this Court a true, full and complete copy of all material parts of the record herein which shall be designated by præcipe or stipulation of the parties or their counsel herein, all in accordance with the applicable statutes and the Rules of the Supreme Court of the United States.

It is Further Ordered that the cost bond of petitioner J. D. Adams Manufacturing Company, as appellant in said appeal, in the sum of One Thousand Dollars ($1,000.00) is a good and sufficient bond that said appellant shall prosecute said appeal to effect and answer all costs if it fails to make its plea good, and the same is hereby approved.

Dated this 29th day of November, 1937.

Walter E. Treanor, Chief Justice of the Supreme Court of Indiana.

[fol. 134] [File endorsement omitted.]

[fols. 135-146] Bond on appeal for $1,000.00, approved and filed November 29, 1937, omitted in printing.

[fols. 147-153] Citation, in usual form, showing service on Omer S. Jackson et al., filed November 29, 1937, omitted in printing.

[fol. 154] IN SUPREME COURT OF INDIANA

[Title omitted]

PRÆCIPE FOR TRANSCRIPT OF RECORD—Filed November 29, 1937

To the Hon. Paul Stump, Clerk of the Supreme Court of Indiana:

Please include the following papers in the transcript of the record in the above entitled cause to be transmitted to the Supreme Court of the United States pursuant to the allowance of appeal thereto in this cause. Also indicate as to all papers filed in your office the date of the filing of the same.

1. The transcript of record filed in your office which [fol. 155] shows inter se:

(a) Plaintiff's Complaint;
(b) Summons;
(c) Return on Summons;
(d) Appearance;
(e) Answer of Defendants;
(f) Finding of Court;
(g) Judgment of Court;
(h) Defendants' Motion for New Trial;
(i) Motion for New Trial Overruled;
(j) Appeal Granted;
(k) Præcipe for Transcript;
(l) Bill of Exceptions; Plaintiff's Exhibit No. 1, Stipulation of Facts;
(m) Certificate of Court Reporter;
(n) Certificate of Judge;
(o) Certificate of Clerk;
(p) Assignment of Errors.

2. The following portion of appellants' printed brief in the Supreme Court of Indiana, specifying the points to be relied on for reversal, appearing under the heading of "Propositions, Points and Authorities", and including particularly the heading and first literal paragraph on page 51 of said brief, and all of that part of said brief following and including the heading "Proposition II", beginning on page 54 of said brief and extending to and including all of page 60 of said brief.

3. Decision and order reversing judgment of trial court, and the opinion of Fansler, J. for the majority of the Supreme Court of Indiana, and the dissenting opinion of Treanor, J. in said cause, rendered May 3, 1937.

4. The appellee's petition for rehearing.

5. The order of September 20, 1937 denying the petition [fol. 156] for rehearing.

6. Petition for appeal to the Supreme Court of the United States, assignment of errors and prayer for reversal.

7. Order allowing said appeal and approving cost bond.

8. Cost bond and approval thereof.

9. Citation and proof of service thereof.

10. Proof of service of appeal papers.

11. This præcipe for transcript.

12. Any stipulation or orders settling the record.

13. Copy of the Regulations of the Gross Income Tax Division promulgated under the Gross Income Tax Act of 1933, on July 31, 1934, including Regulation 193 approved December 31, 1935.

14. Your certificate as to the record.

15. Statement as to jurisdiction of the Supreme Court of the United States filed with said petition for appeal, said statement to be separately certified to.

Frederick E. Matson, Harry T. Ice, Attorneys for Appellee, J. D. Adams Manufacturing Company.

Acknowledgment of Service

Receipt of a copy of the above præcipe for transcript of record is acknowledged this 29th day of November, 1937.

Omer Stokes Jackson, Attorney General of Indiana; Joseph W. Hutchinson, Deputy Attorney General of Indiana; Joseph P. McNamara, Deputy Attorney General of Indiana, Attorneys for Appellants.

[fol. 157] [File endorsement omitted.]

[fol. 158] THE DEPARTMENT OF TREASURY OF INDIANA

REGULATIONS PROMULGATED UNDER THE GROSS INCOME TAX ACT OF 1933

Gross Income Tax Division

Clarence A. Jackson, Director

[fol. 159] Foreword

These regulations are designed to assist the taxpayer in accurately reporting to the Department his true gross income and are issued by virtue of the authority vested in The Department of Treasury by the gross income tax Act, and will have the same force and effect in the application of the gross income tax law as the Act itself. Necessarily, these regulations must be more or less general and it must not be assumed that they cover every conceivable situation that might arise in regard to the taxability or ownership of income, or the legality of exemption thereof. Intricate questions should be submitted in writing to the Legal Department of the Gross Income Tax Division for specific rulings.

The taxpayer is reminded that the burden of responsibility for filing his tax returns and accurately reflecting his true gross income thereon is strictly imposed upon himself and it is the intention of the Department to assist him by these regulations and by specific rulings when requested.—

C. A. Jackson, Director, Gross Income Tax Division.

[fol. 160] Art. 1—Definitions

Regulations

Article 1

Definitions

Regulation 1. Person as defined in Section 1 (a) includes any individual, firm co-partnership, joint venture, assoc-a-tion, corporation, municipal corporation, estate, trust, or any other group or combination acting as a unit, and the plural as well as the singular number, unless the intention to give a more limited meaning is disclosed by the context.

Reg. 2. Taxpayer.—Any resident of the State of Indiana, any non-resident corporation qualified to and engaged in

business with the State of Indiana, and/or any "person" as defined in Regulation 1, resident or non-resident, engaged in business within or receiving income from within the state.

Reg. 3. Tax Year or Taxable Year means either the calendar year, or the taxpayer's fiscal year if and when permission is obtained from The Department of Treasury to use the taxpayer's fiscal year as the tax period in lieu of the calendar year.

Reg. 4. Tax Period as hereinafter used refers to either a calendar or a fiscal year or a quarterly period of either of such years, and in case a return is made for a fractional part of the year, "tax period" will be deemed to mean the period for which such return is made. However, in no case can a return be filed covering a period of more than twelve months.

Reg. 5. Fiscal Year means any accounting period of twelve months ending on the last day of any month other than December.

[fol. 161] Reg. 6. Gross Income consists of the gross receipts as hereinafter defined, from any business, together with any other moneys (not including borrowed money) or properties received from any and all other sources and from other activities, without deduction for expenses, for costs of goods sold, or amount of property left on hand.

Reg. 7. Gross Receipts.—The amount received either in money or property, or both, from a transfer of possession of any tangible or intangible property, personal service, interest, discount, rents, royalties, bonuses, fees, commissions and other emoluments however designated.

Reg. 8. Gross Earnings.—Gross earnings will be deemed to be the gross income of certain businesses and institutions as hereinafter set forth. (See Regulation 89.)

Reg. 9. Sale.—(a) Executed—A transfer of title to property for a fixed price in money or money's worth.

(b) Conditional—A sale based on a contract, the title of the property remaining in the seller until terms of the contract have been complied with.

(c) Retail—A sale made direct to the user or consumer.

(d) Wholesale—A sale made to another for resale.

Reg. 10. Individual.—An individual taxpayer is a person who is required to file a return in his own individual right. One who has control of property belonging only to himself and no other.

Reg. 11. Co-partnership.—A partnership is a fact and not a theory. A partnership is composed of two or more individuals associated together for the purpose of carrying on a given business or a given business transaction and is a business organization in which every partner possesses full power to bind all the partners by his act, [fol. 162] and in which each partner is responsible for the debts of the partnership. Partnerships are not subject to tax, but the partners are taxed on their respective gross receipts. Joint investment in and ownership of real and personal property not used in the operation of any trade or business and not covered by any partnership agreement does not constitute a partnership.

Reg. 12. Firm.—A firm includes persons composing a partnership collectively and refers to the title under which the members of a partnership transact business.

Reg. 13. Dividend.—For the purpose of this Act the word "dividend" means any distribution made by a corporation out of its earnings or profits to shareholders or members ~~in cash~~ or property (except additional stock of the declaring corporation).

Reg. 14. Joint Venture.—A joint venture is a joint investment by two or more persons in an ownership of property not used in the operation of any trade or business and not governed by any partnership agreement.

Reg. 15. Fiduciary.—The word "fiduciary" means a guardian, trustee, executor, administrator, receiver, conservator, commissioner, or any person, whether individual or corporate, acting in any fiduciary capacity for any person, trust or estate.

Article 2

General Scope and Application of Tax

The Gross Income Tax Act of 1933 is primarily and in effect a gross receipts tax applying to the gross receipts of every taxpayer under the Act from all sources without

allowances, or deductions for costs, expenses or dependents, and is, therefore, in no way a net income tax. It applies to income from sales of all kinds of property or com-[fol. 163] modities in business and in this case is measured by the gross income derived from such sales. In this respect and to this extent it operates as a sales tax. There are not two separate and distinct laws in Indiana—that, is a gross income tax and a sales tax—whatever elements of a sales tax there might be are embodied in and made a part of the gross income tax law.

Administration of the Act. The administration of the Gross Income Tax Act is vested in The Department of Treasury of Indiana under the jurisdiction of the Treasurer of State as the Chief Administrative Officer. The Gross Income Tax Division of The Department of Treasury is under the direct administration of C. A. Jackson, Director, with offices at 141 South Meridian St., Indianapolis, Indiana.

Reg. 16. Effective Date of Law.—Tax shall apply to and shall be levied and collected upon all gross income received on or after the first day of May, 1933, regardless of the fact that such income was earned or became due prior to that date.

Reg. 17. To What Tax Applies.—The entire gross income from sales, salaries, wages, rentals, commissions, dividends, royalties, and from any source whatever, of every person named in Reg. No. 1 and Reg. No. 2 in excess of $1,000 a year, except such income as is specifically excepted under the Act or hereinafter designated as being exempt from taxation.

Reg. 18. Method of Payment.—Taxpayers must fill out forms as designated in Reg. No. 167 reflecting their true gross income thereon and transmit such forms properly [fol. 164] executed to The Gross Income Tax Division, 141 South Meridian St., Indianapolis, Indiana. All returns must be notarized before a duly commissioned notary public or some official authorized by law to administer oaths.

Reg. 19. Where Forms May Be Obtained.—All forms may be obtained upon request from The Gross Income Tax Division, 141 South Meridian St., Indianapolis, Indiana, or from the various automobile license bureaus in the several counties and from other distribution points.

Reg. 20. Tax Remittances.—All returns must be accompanied by a remittance for the tax reflected on the return. Checks should be made payable to the Gross Income Tax Division. Express money orders may be purchased at auto license bureaus. Cash or currency should be sent by registered mail. Remittances may be made by check, money order, or draft. However, collection expenses on remittances of this kind will not be borne by the state and no taxpayer's tax will be considered paid until such check or draft has been cleared.

Article 3

Income and Rates

Reg. 21. Income from Sales.—Gross income derived from sales is taxable at the following rates:

From sales made to consumer—1% (See Reg. No. 9-c).

From sales made for resale—¼ of 1% (See Reg. No. 9-d).

Reg. 22. Other Income.—Income from salary, wages, bonuses, rentals, commissions, royalties, dividends, fees, service charges, and other income not specifically provided for, will be taxed at the rate of 1%.

[fol. 165] Reg. 23. Source of Income.—Source or nature of income may govern the classification of the income as to its taxability or exemption and in some cases determines the rate of tax that will apply.

In general, income is derived from the following sources and is taxed at the rate specified:

Commissions	1%	Salaries	1%
Contracts	1%	Sales, retail	1%
Discounts	1%	Sales, wholesale	¼ of 1%
Dividends	1%	Service charges	1%
Fees	1%	Storage charges	1%
Interest	1%	Sub-contracts	¼ of 1%
Premiums	1%	Tuitions	1%
Rentals	1%	Utility charges	1%
Royalties	1%	Wages	1%

Exemptions

Reg. 24. Exemption by Periods.—Each taxpayer is entitled to an exemption of $1,000 for a full year of twelve

months, which exemption may be taken only on annual returns. Upon quarterly returns $250 is the maximum exemption allowed. Exemptions for other periods are allowed according to the duration of such period at the rate of $83.33 per month. A fraction of a month shall be disregarded unless, such fraction exceeds half a month, in which case it shall be taken as a whole month.

Taxpayers having classes of income taxable at different rates may deduct the entire exemption from the 1% column, and if the exemption exceeds the total income in that class the remainder thereof may be taken from the ¼ of 1% column.

Reg. 25. New Residents.—Termination of Residence. Taxpayers moving out of or into the state may take only [fol. 166] the exemption covering the period of their residence in the state in any taxable period at the rate of $83.33 per month.

Reg. 26. Marriage or Dependents.—No additional exemption is provided on account of marriage or dependents.

Reg. 27. When No Returns are Required.—No returns shall be required from persons not subject to any tax liability hereunder in the taxable year, except information returns as required by Regs. 78 and 166.

Article 5

Exclusions

Reg. 28. Definition.—"Exclusions" are deemed to be items received as gross income which are exempt by reason of specific exemption granted by the Act or the department's regulations.

Reg. 29. Specific Exclusions.—Gross income tax will not be imposed on the following items of income and taxpayers will not be required to include such items in their report, or if included in Schedule A of the return the same may be deducted under Schedule 2: (See Article 13.)

(1) Amounts received by beneficiaries under insurance policies by reason of death of the insured. (See Reg. 57).

(2) Amounts received other than amounts paid by reason of the death of the insured, under life insurance endowment or annuity contracts, either during the term or at maturity

or upon surrender of the contract, but in no case in excess of the total amount of the premiums paid upon such contracts. (See Reg. 58.)

(3) Money received as salary and other emoluments from the United States government or any of its regular and essential departments paid in connection with a regular and continuous official position. (See Reg. 61.)

[fol. 167] (4) Receipts from sale of and interest on United States government bonds or possessions of the United States. (See Reg. 62.)

(5) Money received from sale of municipal bonds or bonds of any sub-division of the State of Indiana. (See Reg. 62.)

(6) Receipts by reason of maturity of bonds and of preferred stocks. (See Reg. 62.)

(7) Money received as agent. (See Reg. 65.)

Article 6

Deductions

Reg. 30. Definition.—"Deductions" as herein used refers to the subtraction of non-taxable amounts (shown in Schedule 2 of the return) from amounts in Schedule A and can only be taken when the same amounts have been included in such Schedule A. However, for the purpose of checking and auditing, certain non-taxable receipts are required to be reported and deducted on the same return. Deductions must be made on the same returns upon which the deductible amounts have been included and not upon subsequent quarterly returns. However, proper deductions of non-taxable income not previously taken on quarterly returns may be made on the annual return. Any amounts not required to be reported at all are properly called "exclusions."

Reg. 31. Specific Deductions.—The following items must be reported in Schedule A of the taxpayer's return and deducted therefrom under non-taxable items listed in Schedule 2 of the same return. Every deduction must be set out and fully explained upon the return or upon a separate sheet attached thereof: (See Article 14.)

(1) Allowances on returned goods when the sales price [fol. 168] is refunded to the customer, either in cash or by credit.

(2) Cash discounts allowed and taken on sales. (See Reg. 66.)

(3) Money received by the shipper in repayment of freight charges when prepaid as such. (See Reg. 67.)

(4) The sales price of any article accepted as part payment on any new article sold if and when the full sales price of the new article has been included for gross income taxation. (See Reg. 72.)

(5) Traveling expenses as limited in Reg. 68.

(6) Taxes collected as agent for the state or federal government. (See Reg. 69.)

(7) Receipt of outright gifts. (See Reg. 70.)

(8) Pensions under limitations set out in Reg. 71.

Article 7

Tax Periods

Reg. 32. Calendar Year.—Taxpayers will be required to file on the basis of the calendar year unless they are granted permission by the department to file on the basis of their fiscal year.

Reg. 33. Fiscal Years.—Taxpayers transacting business upon the basis of their fiscal year may be granted permission to file returns and pay tax upon such basis upon application being made to the department of treasury upon Form No. 100-L, and upon approval of the application. Schedule 102-L will be furnished the taxpayer, upon which will be designated the return dates of all subsequent quarterly and annual returns.

Reg. 34. Partnership Firms.—Members of partnership firms which have been granted permission to file returns on the fiscal year basis may upon request be allowed to file [fol. 169] their individual returns upon such basis to correspond with the firm's fiscal year, subject to the permission, approval and direction of the department of treasury.

Reg. 35. Tax Periods on Calendar Basis.—

Annual.—On annual returns the tax periods shall be from January 1st to December 31st, inclusive.

Quarterly:

1st quarter—January, February and March.

2nd quarter—April, May and June.

3rd quarter—July, August and September.

4th quarter—October, November and December (annual).

Reg. 36. Tax Periods on Fiscal Year Basis.—

Annual.—On annual returns the tax period shall be for a period of twelve months ending on the last day of the taxpayer's fiscal year.

Quarterly.—Quarterly periods on the fiscal year basis shall be those designated for such taxpayers on Form 102-L.

Reg. 37. Fourth Quarterly Return Included in the Annual Return. In every case, whether on calendar or fiscal year basis, the fourth quarterly return shall be an annual return and shall reflect the taxpayer's gross income for the entire annual tax period notwitstanding that returns have been made for quarterly periods and tax paid thereon. No separate return for the fourth quarterly period shall be required. From the gross income reflected on the annual return the taxpayer is entitled to the annual exemption of $1,000 and tax will be computed upon the balance. From such computed tax reflected on the annual return, tax payments made for any quarterly period included therein may be deducted. Any return made because of the death of a taxpayer, dissolution or withdrawal of a [fol. 170] corporation, or the filing of a final report by a fiduciary, will be considered an annual return and shall reflect all gross income of the taxpayer received from the beginning of the year, either calendar or fiscal to the date of the death, dissolution, withdrawal, or filing of final report, and upon all such returns exemption may be taken at the rate of $83.33 per month from the date of the beginning of tax liability in the taxable year to the end of such year regardless of the unexpired portion thereof.

Individuals terminating their residence in the State of Indiana will be allowed only the amount of exemption proportionate to the actual duration of their residence in any taxable year as set out in Reg. 25.

Article 8

Due Dates of Tax and Returns

Reg. 38. Tax Returns—

Annual.—Annual returns will be due on or before the 30th day of January if taxpayer is reporting on the calendar year basis, or on or before the 30th day following the closing date of the fiscal year if the taxpayer is reporting on that basis. Annual returns must be filed by all taxpayers whose taxable gross receipts are in excess of $1,000.

Quarterly.—Quarterly returns on the calendar year basis will be due on or before the following dates:

1st quarter—April 15th.
2nd quarter—July 15th.
3rd quarter—October 15th.
4th quarter—January 30th (annual).

[fol. 171] If taxpayer is reporting on a fiscal year basis quarterly returns will be due as designated upon Schedule 102-L. (See Reg. 36.)

Reg. 39. Information Returns.—Information returns required by Reg. No. 166 will be due annually on the 15th day of February.

Reg. 40. When Quarterly Returns Are Mandatory.—Quarterly returns are mandatory only for those quarters, both fiscal and calendar, in which the taxpayer's tax exceeds $10. Each quarter is a tax period in itself, and the fact that a taxpayer must file a quarterly return in one quarter does not of itself require returns for other quarters in which his computed tax may be $10 or less. The department will not waive the requirement for quarterly returns in cases where the taxpayer's computed tax is in excess of $10.

While quarterly returns are not mandatory, except when tax is more than $10, any taxpayer choosing to file returns and pay tax by quarterly periods may do so at his option.

Reg. 41. Extensions of Time.—Taxpayers must file their returns on or before the due dates as set out in Reg. 38 to avoid assessment of penalties. Extensions of time for filing returns will be granted by the Department of Treas-

ury for good cause when application is made therefore on or prior to the last due date. Application for extensions of time for filing gross income returns must be address- to The Gross Income Tax Division At Indianapolis, Indiana, must contain a full recital of the cause for delay, and must be in writing over the signature of the taxpayer or his agent.

No blanket extension covering all tax periods in a taxable year will be granted, but application must be made [fol. 172] for each tax period for which a return is to be made, on or before the last due date of returns for such periods.

No extension can be granted beyond the 15th day of the month next following the last regular due date.

In case the taxpayer does not avail himself of the extension granted but files his return subsequent to the date of such extension, he will be deemed to be delinquent from the returns will be granted by the Department of Treasury for last regular due date and it will not be assumed that the regular due date has been extended. Therefore, in such cases interest, penalties and notices as provided by law will operate as of the regular due date and not the date to which extension was granted.

The extreme dates to which extensions can be granted taxpayers filing on the calendar year basis are as follows:

1st Quarterly Return due April 15th—Extension May 15.

2nd Quarterly Return due July 15th—Extension August 15th.

3rd Quarterly Return due October 15th—Extension November 15th.

4th Quarterly Return (Annual Return) due January 30th—Extension February 15th.

Information at Source Returns due February 15th—Extension March 15th. (See Reg. 166.)

Article 9

Corrections on Returns

Reg. 42. Amended Returns.—No gross income tax return when once filed will be returned to the taxpayer for cor- [fol. 173] rection, but whenever any taxpayer discovers or is informed by the department that his gross income has been erroneously reported, correction may be made by

filing an amended return, which shall be plainly marked on its face "Amended Return" and which shall reflect the taxpayer's correct gross income in the proper columns and in the correct amounts as it should have been originally reported by him.

If such amended return shows additional tax due, remittance for such additional amount must accompany the amended return, and if upon examination such amended return shows an overpayment of tax, the amount of such overpayment will be credited against any tax due on any subsequent return for the taxable year and any balance or excess at the end of the year, and upon the filing of an annual return will be refunded to the taxpayer having made such overpayment, or to his estate as the case may be.

Reg. 43. Refund of Overpayment.—No claim for refund of tax will be considered unless the taxpayer claiming such refund has made application to the department of treasury upon Form 111-L. This form must set forth the amount of overpayment claimed, the period covered by the return upon which the overpayment was made, and shall fully set forth the reasons upon which the claim is based. Statements of claims for refunds must be executed by the persons to whom the claim is alleged to be due. Corporation claims must be made in the name of the corporation and executed by an officer thereof. Fiduciaries will be required to furnish certified copies of their appointment to accompany claims for refund of taxes not paid by them in their fiduciary capacity.

If upon examination of any return or statement of claim the department of treasury finds that the facts entitle the [fol. 174] taxpayer to a refund of any amount, voucher Form No. 110-L stating the amount found to be due will be transmitted to the taxpayer, and upon its return to the department of treasury, duly verified and executed, payment will be made thereon.

Article 10

Income Taxable at Different Rates

Reg. 44. Taxpayers' Books and Records.—Every taxpayer will be required to keep such records of his gross income as will accurately reflect the same and such evidence of gross income as will be necessary for him to determine

the amount of tax for which he is liable under the provisions of this Act. And it shall be the duty of every such person to keep and preserve such records for a period of two years, and all such records shall be open for examination at any time by the department of treasury or its duly authorized agents.

Reg. 45. Separation of Income.—Any taxpayer receiving gross income taxable at different rates, i. e. a part of which is taxable at 1% and a part at ¼ of 1%, will be required to separate such receipts upon his books as to the class in which each will be reported; otherwise the 1% rate will apply to the entire amount of gross income. Such segregation shall be subject to the review of the department of treasury as provided by law.

Reg. 46. Rates of Utilities.—A division of retail and wholesale sales may not be made by taxpayers engaged in the business of producing, transmitting, wholesaling and/or retailing electrical energy; or procuring, transporting, wholesaling and/or retailing artificial gas, or mixtures of artificial and natural gas, operating a steam and/or elec- [fol. 175] tric *electric* railway, street car line, motor vehicle, steam or motor boat, or any other vehicle for the transportation of freight, express and/or passengers for hire; operating a pipe line for the transportation of any commodity for hire; operating any telephone and/or telegraph line; operating any water or sewer system; or operating any other utility not expressly provided for elsewhere, but a tax will be imposed upon all receipts therefrom at the rate of 1%.

Article 11

Rates of Manufacturers and Other Industries

Under Section 3-a-b-c

Reg. 47. Wholesale and Retail Sales.—While Section 3 (sub-sections a-b-c) reflects the rate at which the gross income of manufacturers, wholesalers, retailers, jobbers and taxpayers of other occupations shall be taxed, it is held by the department of treasury that no taxpayer continues to hold a rate classification as set out in the above section when property is disposed of in a different manner

than that in which it is ordinarily disposed of by taxpayers in that particular class. Therefore, any taxpayer mentioned in Section 3 (a or b) will be deemed to be selling at retail whenever a product is disposed of direct to the consumer and the receipts therefrom will be taxable at the rate of 1%. Likewise a taxpayer engaged in the business of disposing of goods at retail will only be taxed at ¼ of 1% upon such property sold by him to be resold.

Article 12

Certain Sales Defined as Wholesale and Retail

Reg. 48. Wholesale Sales.—Wholesale sales are defined by the department as being any sales made to another for resale regardless of price or quantity, and whenever the [fol. 176] taxpayer can show that the purchaser is buying an article for the purpose of reselling it, it will be deemed to be a wholesale sale and ¼ of 1% rate will apply.

Reg. 49. Sales of Seed, Feed, and Growing Plants or Livestock to Agriculturists.—The gross receipts from the sale of seed, feed, growing plants or livestock to anyone engaged in the business of agriculture, production of livestock, poultry, eggs or any other product of the farm, orchard, garden or greenhouse will be included as gross income and a tax imposed thereon at the rate of ¼ of 1%. This would apply to the proceeds from the sale of seed, feed, growing plants or livestock, even though the sale was made to a taxpayer engaged in the same business, unless from the nature of the sale made it is readily determined that the article sold is intended to be consumed by the purchaser, then the gross receipts therefrom will be taxable at 1%.

While Section 3(a) of the gross income tax Act provides: "Upon the entire gross income of every person engaged in the business of * * * or in agriculture, including the production of livestock, poultry, eggs or any other product of the farm, orchard, garden or greenhouse, one-fourth of one per cent," it is held that a sale made directly to a consumer is a sale at retail and tax will be imposed on the gross receipts from such sale at the rate of 1%.

Reg. 50. Sales to Manufacturers, Utilities and Service.— (a) The rate of ¼ of 1% will apply to gross receipts of taxpayers, (other than those named in Section 3-d) from

sales of commodities to any utilities named in Section 3-d which commodities are to be consumed by such utilities in production, transmission or operation. This rate will also apply to gross receipts from sales or articles or commodities to manufacturers which articles or commodities become an integral part of, or are consumed in the completed manu- [fol. 177] facture of any article for sale. However, this will not apply to receipts from sales of any items which would be classified as capital items such as equipment, machinery, furniture, etc., but receipts from the sales of such items will be considered as from sales to the user and will be taxable at the rate of 1%. The word "consumed" as used herein shall not mean or include the obsolescence, depreciation, or wear occasioned by the use or age of equipment or furnishings of buildings, machinery, tools or articles, used either on the interior or exterior of any plant or building used by a manufacturer or a utility.

(b) Sale of Tools, Dies, etc., to Manufacturers.—The gross receipts from the sale of tools, molds, dies and patterns to a manufacturer for the purpose of manufacturing special articles are to be considered as having been consumed in the manufacture of such special articles when such tools, molds, dies and patterns do not have a useful life beyond the manufacture of such special articles and will be taxable at the rate of ¼ of 1%. However, if such tools, molds, dies and patterns, even though purchased to be used in the manufacture of special articles, are such tools, molds, dies and patterns which would have a longer useful life and could be used in general manufacture, then they will be considered capital items as all general tools, molds, dies and patterns, and the gross receipts from the sale thereof to such manufacturer will be taxable at the rate of 1%.

(c) Sales to Industries or Persons Rendering Service.—Sales of materials to trades, industries or persons engaged in rendering services, which materials are used only in or incidental to the rendering of such services, will be deemed to be sales at retail and the receipts therefrom taxable at 1%. [fol. 178] Department Regulation No. 50, approved July 31, 1934, is hereby revoked and superseded by this revision and amendment (Approved: November 1, 1935.)

Reg. 51. Sales by Materialmen to Contractors.—If a contractor enters into a contract to build a structure com-

plete for a stipulated sum or purchases materials for the purpose of erecting any structure, for resale, the material sales to such contractor shall be considered wholesale and receipts from such sales will be taxed at ¼ of 1%.

If a building contractor enters into a contract to build a structure, the material to be furnished by the owner, the material sales to such owner shall be considered as retail and the receipts therefrom will be taxable at 1%.

If a building contractor enters into a contract to build a structure on a per diem or percentage basis, the material to be furnished by the owner, such material sales shall be considered as retail and the receipts therefrom will be taxable at 1%.

Reg. 52. Sales by Materialmen to Individuals.—All material sold by materialmen to individuals shall be considered as sold at retail and the receipts therefrom will be taxable at 1%.

Reg. 53. Ice Dealers.—When ice is sold to a retail merchant whose sole use of such ice is for the preservation of food products, which vendee has for sale, such sales of ice shall be considered as wholesale sales, and shall be included in gross receipts taxable at the rate of ¼ of 1%, but all receipts from sales made direct to the consumer must be included for taxation at the rate of 1%.

Reg. 54. Sales to State or Sub-Divisions.—All sales to the State of Indiana or other states or any sub-division of either will be considered as sales to the consumer and the [fol. 179] receipts therefrom must be reported as receipts from retail sales and taxable at the rate of 1%.

Reg. 55. Sales of Real Estate.—All gross receipts from sales of real estate must be reported for taxation at the 1% rate.

Reg. 56. Sales to Restaurants.—Taxpayers selling produce or any article to be served with or as meals sold to the public will be considered as selling such produce or materials at wholesale and gross receipts from such sales will be taxable at the rate of ¼ of 1%.

Article 13

Regulations Applying to Exclusions under Article 5

Reg. 57. Death Benefits.—The receipt of proceeds from life insurance policies received by an estate, trust or indi-

vidual beneficiaries of an insured by reason of the death of the insured is not taxable income whether received in a single sum or in installments. However, if such proceeds are held by the insurer for the beneficiary under an agreement to pay interest thereon such interest will be considered taxable gross income when received, credited or made available for withdrawal.

Reg. 58. Annuities.—Except as provided in Reg. 57 any amounts received on life insurance endowment or annuity contract, either during the term or at the maturity of, or upon surrender of the contract will be considered taxable income for the amount which is in excess of the premiums paid upon such contracts.

Reg. 59. Disability Insurance.—

(a) Life Insurance Policies.—Taxpayers receiving disability benefits upon life insurance policies with disability provisions will be required to list such amounts for taxation [fol. 180] without regard to premiums paid in.

(b) Industrial Board Awards.—Amounts received on account of awards by industrials boards for injury and disability will be taxable under the gross income tax Act and the entire amount must be reported for taxation without deduction for medical or other expenses.

(c) Health and Accident Policies. — Proceeds received from health and accident policies shall be considered taxable gross income and the entire amount must be included in the gross income tax returns of the policyholder for taxation.

(d) Insurance Policy Dividends.—See Reg. No. 107 (b).

Reg. 60. Property Insurance.—If the proceeds from an insurance policy covering loss or damage to property is used in replacing property of like kind the amounts so applied will not be included in the gross income tax return. However, if such amounts are otherwise applied they shall be included in gross income tax returns for taxation.

Reg. 61. Money received as salary or other emoluments in connection with regular employment by an essential and continuous department of the Federal government, will not be taxable. Persons performing special services for tem-

porary agencies which are not strictly Federal governmental instrumentalities are not exempt.

Reg. 62. U. S. Bonds and Municipal Bonds.—Exemption from gross income tax on non-taxable bonds extends only to the receipts from sale or transfer, and when such bonds are accepted for the full amount or part of the selling price for property, services, or in lieu of cash for any income the person accepting the bonds will be considered to have taxable gross receipts for the accepted value of the bonds.

[fol. 181]

Kind of Security	Proceeds on Maturity	Proceeds from sale of	Interest on
U. S. Government Bonds	Non-taxable	Non-taxable	Non-taxable
Federal Land Bank	Non-taxable	Non-taxable	Non-taxable
Joint-Stock Land Bank	Non-taxable	Non-taxable	Non-taxable
U. S. Treasury Certificates	Non-taxable	Non-taxable	Non-taxable
H. O. L. C. Bonds	Non-taxable	Non-taxable	Non-taxable
Indiana Agricultural Bonds	Non-taxable	Non-taxable	Non-taxable
Municipal Bonds	Non-taxable	Non-taxable	Taxable
County Gravel Road	Non-taxable	Non-taxable	Taxable
All other bonds issued as non-taxable by subdivision of the State of Indiana	Non-taxable	Non-taxable	Taxable
National Guard Armory	Non-taxable	Taxable	Taxable
Corporation Bonds	Non-taxable	Taxable	Taxable
Postal savings	....	....	Taxable

Reg. 63. Bonds of United States Possessions.—Bonds issued by a municipality or a school board of Porto Rico under the authority of an act of the legislative assembly of the Porto Rico, approved February 19, 1913, which provides for the approval by the executive council of Porto Rico as a prerequisite to the issuance of such obligations and which pledges the good faith of the people of Porto Rico as security for their payment, are held to be obligations of a possession of the United States, the interest upon which is exempt from income tax.

The principal of bonds issued by the people of Porto Rico is exempt from taxation by the United States under the act of congress approved March 2, 1917. The interest derived from such bonds is exempt from income, war profits and excess profits taxes under the provisions of Section 213 (b), [fol. 182] revenue act of 1918.

Any possession of the United States includes, among others, Porto Rico, the Philippines and the Virgin Islands, Alaska and Hawaiian Islands.

Reg. 64. Contracts with United States Government.—Money received in payment for performance of construc-

tion contracts or rental contracts with the United States government, its departments or agencies will not be deemed to be money received from sales as any emolument paid by the government or its agencies, and all receipts from such contracts must be included for gross income taxation.

Reg. 65. Money Received as Agent.—Money or property received by a taxpayer in which he has no right, title or interest, but is received as agent for a third party or parties, will not be included in the taxpayer's individual return of gross income, but any commission received by him for his services as agent must be included as taxable gross income. However, when property is handled on consignment the consignee must report the entire proceeds therefrom and pay tax thereon as set out in Reg. No. 173.

Article 14

Regulations Applying to Deductions under Article 6

Reg. 66. Cash Discounts.—Cash discounts allowed on sales may be deducted only when the full amount of the selling price has been included in Schedule A of gross income tax returns.

Reg. 67. Freight.—Shippers receiving any amounts in repayment of freight charges which have been prepaid by them may deduct such amounts from gross income tax returns when such amounts have been included in Schedule A. Items of this nature will be treated the same for gross in- [fol. 183] come tax purposes as the return of amounts advanced to another taxpayer or as loaned money. In order to claim deductions of this kind on gross income tax returns the shipper must have actually prepaid freight for the purchaser. In no case can freight charges be deducted as an expense by either the shipper or his customers, and this deduction can in no way refer to freight charges which are a cost of doing business. The purchaser can never have prepaid freight deductions, as to him freight charges are a cost of doing business and deduction therefore can in no way be taken. In all cases where deductions are made for repayment of freight charges a full statement of the facts and the nature of the transactions must accompany the return.

Reg. 68. Reimbursement of Traveling Expenses.—Whenever any employee either on a salary, commission or draw-

ing account, incurs and pays expenses for his employer incident to his employment and submits to such employers an itemized account of such expenses and is reimbursed therefor, the amount received by the employee in reimbursement may be deducted under Schedule 2 of his gross income tax returns, but must be included in Schedule A. Any other arrangement between employer and employee will not permit any deduction or elimination to be made. No employee may make a deduction where he pays expenses out of his own compensation. In no case may an employer deduct the amount of expenses incurred by employees in his own gross income tax return.

Department Regulation No. 68, approved July 1, 1934, is hereby revoked and cancelled and is superseded by this regulation which shall be in force and effect from October 1, 1935. (Approved October 1, 1935.)

Reg. 69. Taxes Collected as Agent.—Taxes collected by a taxpayer acting as an agent for either the State of Indiana [fol. 184] or the federal government may be eliminated from taxpayer's gross receipts on gross income tax returns. Taxes so collected must be reported as a part of the gross receipts shown in Schedule A of the return and deducted under Schedule 2 of the same return. The mere fact that taxes are added to the sales price of articles sold by manufacturers, wholesalers, jobbers, retailers or others and collected as a part of such sales price does not make such taxpayer a collector of the tax for the purpose of deduction of this kind, but it is only when the seller of an article is required by a state or federal tax act to collect such tax from the purchaser and pay it to the state or federal government that the tax so collected may be deducted from returns.

Only vendors may take deductions of this kind and in no way does this privilege apply to purchasers. In all cases where deductions of this kind are made a full statement of the facts and nature of the tax must accompany the return upon which the deduction is taken.

In order for taxpayers to be allowed deduction of the Indiana Gasoline Tax of four cents per gallon, as herein set out, the total number of gallons sold, upon which deduction is claimed, must be reported on Line f(1) of Schedule 2 of the return.

Federal Taxes Deductible:

Amusement (tickets)
Dues and Initiation

State Taxes Deductible:

Gasoline (4¢ gal.)
Automobile
Capital Stock
Cigarette
Compensation Tax (Import)
Electrical Energy
Federal Income
Gasoline

[fol. 185] Federal Taxes Not Deductible:

Grape Products
Malt
Matches
Oil
Processing
Soft Drinks
Tires
Tobacco
State and County Taxes
Athletic Exhibition
Liquor
Wholesale
Manufacturers
Import

State Taxes Not Deductible:

Malt or Wort
Manufacturers
Wholesale
Retail
Whiskey
All License fees

Reg. 70. Outright Gifts.—Outright gifts, whether received in cash or property, may be deducted from the taxpayer's gross income tax returns when such amounts have been included in Schedule A. Receipts of this nature will be sub-

ject to strict scrutiny by the department, and if it appears that there has been any consideration whatever given by a release of rights, payment of debts, past or present services or promise of future service or any other consideration whatever such receipts will be held to be taxable gross income.

Reg. 71. Pensions.—A taxpayer who receives a pension which is paid from funds that have been created partly or wholly by deductions, assessments or contributions from [fol. 186] money belonging to him will be permitted to deduct such sums from gross income tax returns to the extent of such deductions, assessments or contributions when such amounts have been included in Schedule A.

Any amount received as a pension in excess of such deductions, assessments or contributions must be reported for gross income tax. Pensions that have been created from any other source than that set out above must in their entirety be included as gross income subject to tax, except that no pensions received from the United States government or any of its departments need be included as gross income.

A taxpayer may not escape a liability for tax upon any income because any part or all of it is diverted by him or allowed to be diverted by another to a third party either as a gift, deduction or assessment, or to a fund in which such taxpayer may or may not have an interest, and any such amount diverted will be considered taxable income to the taxpayer for the period and at the time such amounts become available to him, which will be presumed to be at the time and in the period so diverted.

Each taxpayer must report and pay upon his full income, either from salaries, wages or otherwise, and no deductions for any contributions or assessments can be taken therefrom.

(a) Widows' Gratuities.—Widows receiving pensions previously paid to deceased husbands will be permitted to deduct such pensions when such amounts have been included in Schedule A. Receipts of this nature will be considered as gifts or gratuities and not as having been received on account of service or as compensation.

[fol. 187] Article 15

Exchange

Reg. 27. Exchange.—Any transaction involving the elements of exchange will be subject to examination and review by the department of treasury. To use the word "exchange" or any form thereof in a contract will not of itself bring the transaction within the law of exchange, except and unless such transaction falls entirely within.

Where one party gives property to another in lieu of cash it will be considered a sale and both parties to the transaction will have taxable gross receipts for the amount of the property so sold and received, and it shall be deemed to have been sold and received for an amount representing its true cash value.

Where property is sold and the proceeds or credit is used for the purpose of purchasing or procuring other property such transaction is not an exchange but a sale.

If title to goods, produce, merchandise and/or commodities of any nature is transferred and paid for by other goods, produce, merchandise and/or commodities of any nature such transaction will be considered a sale by both of the parties thereto and each will have taxable gross receipts for the full amount of the transaction.

The following transactions will be considered to come entirely within the law of exchange and only such transactions will be so considered:

(a) Where stock certificates, bonds, and/or securities are mutually exchanged for other stock certificates, bonds and/or securities, either in the same corporation or in different corporations.

Such stock certificates, bonds, and/or securities must be owned by the parties to the transaction. However, if [fol. 188] there is an additional consideration given by either party, one to the other, either in cash, or property in lieu of cash, such additional consideration will constitute taxable gross income to the party so receiving same, and the party transferring such other property will be considered as having taxable gross income for the true cash value of the property so transferred.

(b) Where two parties mutually exchange real estate, one with the other and one for the other, and no other consideration is given or received by either party to the transaction.

If, however, in the transfer of property, one for the other, there is an additional consideration given by either party thereto, either in cash or property in lieu of cash; such additional consideration will constitute taxable gross receipts to the party so receiving same, and the party transferring the property as additional consideration will have a like amount of taxable gross receipts on account of the property so transferred.

(c) Where a used article is traded in on the purchase of a new article the price allowed for such traded article will not constitute taxable gross receipts to the party so trading in such article.

This will include automobiles, furniture, washing machines, radios, etc. However, where a used article is accepted as a part of the purchase price of a new article, the seller of the new article will not include as taxable gross receipts the sale price of the used article when sold, provided the full sale price of the new article sold has been included in gross income subject to taxation at the time of sale.

Any taxpayer who fails to report taxable gross receipts, because in his opinion the transaction comes within the law [fol. 189] of exchanges and it is later held that such transaction does not fall thereunder, will be subject to penalty and interest upon such income as is omitted from his return, unless prior to the time of reporting he has submitted a full and complete explanation of such transaction to the Department of Treasury and has received a written decision exempting such transaction.

Article 16

Basis of Reporting

Reg. 73. Cash Basis.—Cash basis will be the reporting of cash or property actually received by, credited to or made available for withdrawal by a taxpayer, subject to the provisions of Reg. 130 relating to constructive receipts. All taxpayers will be presumed to be reporting on the cash basis unless permission has been obtained to report otherwise.

Reg. 74. Accrual Basis.—No taxpayer may use the accrual basis of reporting unless written application is made to the department and express permission given therefor.

Taxpayers reporting on the accrual basis will be required to include upon their returns the full sales price of any article in the period when sold whether payment is received therefor in whole or in part or if none is received at all. When returns are made on this basis no deductions can ever be taken on account of bad debts or amounts unpaid.

Reg. 75. Changes of Basis of Reporting.—No taxpayer will be granted permission to change his method of reporting on any quarterly return, but if permission to change the basis of reporting is granted, such change must be made as of the beginning of a new annual tax period.

(a) Cash to Accrual. In case permission to change from [fol. 190] a cash to an accrual basis is granted the taxpayer will be required to observe either of the following requirements:

(1) File an amended return for the preceding taxable year and include therein the amount by which his accounts receivable at the end of the preceding taxable year exceeds his accounts receivable at the beginning of such year; or

(2) Include the excess of his accounts receivable at the end of the preceding taxable year over the accounts receivable at the beginning of such year in his subsequent returns on the accrual basis.

In no event will the filing of an amended return for the preceding taxable year entitle the taxpayer to a refund if the amount of his accounts receivable at the end of the year is less than at the beginning.

The permission to file upon an accrual basis is one of privilege and no permission to report on this basis will be granted to enable the taxpayer to obtain relief from taxes.

(b) Accrual to Cash. In case permission to change from an accrual to a cash basis is granted, the taxpayer will be required to observe the following requirement:

(1) Include in his subsequent returns all gross receipts even though part of such gross receipts are collections of accounts receivable which are reflected on his books as of the beginning of the current taxable year.

Article 17

Businesses With Two or More Locations

Reg. 76. Businesses whose income is received at two or more business locations are required to file with their re-

turns, both quarterly and annually, properly executed copies of Schedule E, Form 10, allocating such incomes to [fol. 191] the locations at which such incomes were received.

Article 18

Leased Departments

Reg. 77. Where a department store leases departments to others and collects the accounts of such lessee, the department store may report on all its gross receipts together with the entire gross receipts of such lessee and pay tax thereon at the rate of 1% if sales are made at retail. However, if the lessee desires to make report of his own gross income such lessee will have to include all of the gross receipts collected by the lessor before any expenses and commissions are taken out, and the lessor will be required to furnish to the department of treasury a statement of the entire gross receipts of such lessee collected by the lessor. If the lessee desires and elects to make a return then the lessor will be required to include in his return the commissions charged the lessee.

Article 19

Partnerships

Reg. 78. Co-partnerships as such shall not be subject to any tax as a partnership, but the gross income shall be reported upon Form 3-A and such gross income shall be accounted for and reported by each member thereof in the proportion of their aliquot shares on each member's individual return, and tax shall be paid thereon. Both annual and quarterly returns must be filed showing the gross income of partnerships regardless of the amount of income of such partnerships or of the aliquot shares of each partner.

The partnership returns shall be purely information returns and must be filed by some member of the partnership. [fol. 192] However, the responsibility for filing a partnership return is imposed upon all of the partners alike. The withdrawal by any partner of his own partnership interest need not be reflected in his individual return, but if any partner receives any amount in excess of his interest and such amount is in any way compensation paid him out of the share of any other partner, such amount shall be reported

in the individual return by such partner so receiving such excess.

Article 20

Corporations

Reg. 79. Corporations are named as taxpayers under the gross income tax law and must file returns and pay tax in accordance with the rules laid down for other taxpayers.

Reg. 80. Sales by a Corporation of Its Capital Stock.—Gross receipts derived by a corporation from the sale of its original or its subsequent issue of capital stock will not constitute taxable gross income to such corporation. However, gross receipts from the sale of corporation treasury stock will constitute taxable gross receipts to the corporation and must be included on gross income tax returns for taxation.

Capital stock will be deemed to mean stock that has been authorized at the time the corporation was first formed or any increase in capital stock that is authorized subsequent to that time. This will not be deemed to refer to gross receipts from the sale of any stock purchased or acquired by the corporation after its formation (including company's own stock), and amounts received from sale of stock so purchased and acquired will be taxable gross income to the corporation and must be included in gross income tax returns for taxation.

Reg. 81. Consolidated Returns.—Under the following rul-[fol. 193] ing corporations qualifying there under may file consolidated returns and eliminate receipts from sales by the parent to its subsidiaries and by the subsidiaries to the parent.

The term "wholly owned subsidiary" as used in this Act shall be defined to mean a subsidiary of which 95% of the voting capital stock is held by a parent company.

An affiliated group of corporations shall, subject to these regulations, have the privilege of making a consolidated return under the gross income tax law of 1933.

An affiliated group will be one or more corporations owned through stock ownership by a parent corporation.

The right to file a consolidated return of an affiliated group shall be wholly conditioned under a parent corporation owning 95% of the voting stock of a subsidiary or

subsidiaries and one of the subsidiaries owning 95% of the voting stock of another corporation which is subsidiary to it.

A corporation will cease to be a part of an affiliated group when at any time the stock ownership owned by the members of the affiliated group becomes less than 95%.

If an election is made to file a consolidated return, but one specific exemption of $1,000 will be allowed for the affiliated group.

If any affiliated group elects to make a consolidated return there shall not be included that portion of the gross income of such subsidiary or subsidiaries or parent company which was realized from the sale of property, materials or goods made by the parent to the subsidiary, subsidiary to subsidiary, nor of the subsidiary to the parent. A corporation will become a member of an affiliated group only when a member of the affiliated group becomes the owner of [fol. 194] at least 95% of the voting capital stock of such corporation. In making a consolidated return of an affiliated group it will be necessary to eliminate all inter-company transactions pertaining to gross income. The tax imposed upon an affiliated group will be at the rate imposed upon the gross receipts from the last transaction of a member of such affiliated group. That is, a manufacturer marketing his produce through a subsidiary where the subsidiary sells at retail will be required to report the gross receipts from the sale of the subsidiary as the gross receipts of the affiliated group and be taxed at the rate of 1% thereon.

The consolidated return period will be the taxable period of the parent corporation. The election of making consolidated returns of any affiliated group must be made at the time of making the return of the parent corporation and the subsequent returns must be made in accordance with such election unless application is made to the department of treasury and permission is granted to file returns in some other manner.

An affiliated group will not be considered to include either a parent or a subsidiary located without the State of Indiana.

Corporations filing consolidated returns will be required to use Schedule D.

Reg. 82. Holding Companies.—A corporation owning and holding title to property, which property is leased to an-

other, will be considered to have taxable gross receipts in the amount of rentals so received, which will be subject to the Indiana Gross Income Tax Act.

The holding of title to property and leasing of same is deemed to be conducting a business, and the fact that such holding company does not actively participate daily in [fol. 195] competitive trade or commerce in no way divests it of its character as a business.

Section 1 (f) of the gross income tax Act of 1933 provides in part as follows: "The term 'gross income,' except as hereinafter otherwise expressly provided, means the gross receipts of the taxpayer * * * derived from trades, businesses or commerce * * * and all receipts by reason of the investment of capital, including interest, discount, rentals, royalties, fees, commissions or other emoluments, however designated * * *." By this section rentals are designated to be taxable gross receipts and no exception thereto is found in any other section of the law.

Section 3 of the Act provides that the tax shall be imposed at the following rates: "Section 3 (f). Upon the gross income of every person engaged in any business or activity not enumerated in Sub-sections (a) to (e), inclusive, of this section, including * * * all funds received for the performance of contracts, all funds from the investment of capital, and all receipts from any source whatsoever, one per cent." The word "person" as used in Section 3 (f) is defined in Section 1 (a) as including corporations.

Since a holding company as such is not excepted under the gross income tax Act it must have been the intention of the legislature to impose a tax thereon.

A holding company will therefore be required to make report of its entire gross receipts, including rentals, which may be either paid to it direct or paid to another for its benefit.

Dissolution

Reg. 83. Taxable Receipts of a Stockholder upon Dissolution.—A stockholder receiving cash or property from a corporation either on account of a partial or complete liqui- [fol. 196] dation, or dissolution, where such stockholder is required to surrender his stock therefor, shall be deemed to have received taxable gross income for the full amount of cash or value of property so received.

The value of property received by a stockholder from a corporation will be deemed to be the same value as the assets so transferred are carried upon the books of the corporation immediately preceding the transfer to the stockholder.

If the property so received is to be given any other value than that reflected by the books of the corporation it will be necessary to establish such other value by affirmative evidence, except where the property consists of bonds or stocks of another corporation, or where the property consists of bonds, the obligations of any municipality, county or U. S. government obligations, and such stock or bonds are listed stocks or bonds, then such stock or bonds shall be considered as having a value and be a receipt to the individual of an amount represented by the market value as listed on the date of transfer.

The amount of taxable income so received in no way depends upon the number of shares of stock or upon whether it was an original or a subsequent issue or stock issued as a dividend, except that any holder of preferred stock which is called or retired and the holder thereof does not have the right of election of such retirement shall not be required to include any cash or property received for and on account of such retirement, since such preferred stock will be considered as having matured and the proceeds therefrom not taxable.

Wherever a corporation distributes either cash or property, and the only consideration is the return and re-[fol. 197] tirement of stock, it shall not be considered as having any gross receipts from such transaction subject to tax.

Reg. 84. Certificate of Clearance to Secretary of State from The Department of Treasury.—Under the gross income tax Act of 1933 the secretary of state of Indiana is required to withhold the issuance of a certificate of dissolution of any corporation organized under the laws of Indiana or any certificate of withdrawal of any corporation organized under the laws of another state and admitted to do business in Indiana until the receipt of a notice from the department of treasury to the effect that gross income tax due the State of Indiana by any such corporation has been paid or that such corporation is not liable for any tax under this Act.

Reg. 85. Affidavit; Corporation Not Operating After May 1, 1933.—Upon receipt of an affidavit from a corporation signed by a duly authorized officer of the corporation a cer-

tificate of clearance will be issued immediately. Such affidavit must show the following facts;

(a) Affidavit of Domestic Corporation—

(1) That no business has been transacted since May 1, 1933.

(2) That all assets have been disposed of prior to May 1, 1933.

(b) Affidavit of Foreign Corporation—

(1) That no business has been transacted in the State of Indiana since May 1, 1933.

(2) That all assets located in the State of Indiana have been disposed of prior to May 1, 1933.

Reg. 86. Affidavit; Corporations Operating or Selling Assets After May 1, 1933.—Corporations which have operated [fol. 198] for any period of time since the first day of May, 1933, will be required to file an affidavit with the gross income tax division, which affidavit must be filed by a duly authorized officer of the corporation and show that income tax returns for all periods have been filed, including the date on which the final dissolution papers were filed or to the date said corporation discontinued business and transferred all of its property, and that all such gross receipts, both from operation and sale of capital assets, have been reported in such returns.

(a) Audit.—A corporation having made and filed such affidavit reflecting any operation since May 1, 1933, can only be issued a certificate of clearance when all gross income tax returns so filed by it have been audited and approved by the audit section of the gross income tax division, and upon the receipt of a certificate from the auditing department to the legal department reflecting that all tax liability has been fully liquidated, a notice of clearance will then, and not until then, be issued to the secretary of state.

(b) Exemptions on Final Returns.—A dissolving corporation making a final return for any period other than a full taxable year will be entitled to take exemption at the rate of $83.33 per month from the date of its incorporation in the taxable year to the end of such year regardless of the unexpired portion thereof, and will make such return as

though it were an annual return, and will include, together with its current gross receipts, all other receipts reported in its prior quarterly reports within said year.

Article 21

Deductions under Schedule C

Reg. 87. Deductions of Losses Under Schedule "C."—Any taxpayer who is permitted to make his gross income [fol. 199] tax return under Section 1 (g), that is, upon his gross earnings, will be required to fill out and attach Schedule "C" to his return.

In Schedule "C", line 1 (a), will be reflected the entire gross receipts from the sale of property, which has been acquired on account of businesses and activities such as are enumerated in such section.

On line 1 (b) will be reflected the cost of such property. By the cost of property is meant the amount paid for property if it is such property as is permitted to be dealt in under this section, or property that the taxpayer has been forced to acquire on account of money loaned. In the latter case no additions or improvements put upon the property after acquirement can be reflected as a part of the cost.

On line 1 (c) the gross earnings, which is the difference between the gross receipts and the cost of the property will be reflected. The amount reflected on line 1 (c), if a profit shall be added to all other income as shown on Schedule "C" and shall be shown as a part of the total on line 6. If the amount shown on line 1 (c) is a loss then this amount cannot be carried further and cannot be used to reduced the total of the other items as reflected on Schedule "C".

Reg. 88. Sale of Property.—Whenever any taxpayer, under Reg. 89, liable for gross income tax on gross earnings sells property, the title of which vests in it, such taxpayer will have gross earnings subject to tax on proceeds from such sale whenever the amount received is in excess of the cost of the property so sold. No gross earnings from property sold on conditional sales contracts will be considered to have been realized until the amount received is in excess of the [fol. 200] cost of the property except where the taxpayer periodically allocates part of the payments to interest. Then such amounts as are considered to be interest must be in-

cluded in gross earnings for the period in which they are so allocated.

However, when any such taxpayer has sold property on conditional sales contract and the purchaser cancels the contract, then the amount that has been paid in by the purchaser and which has been credited against the contract price will be considered as taxable gross earnings within the period in which the contract is cancelled, unless such amounts have been previously reported for gross income tax in periods in which they were collected on such contracts.

Article 22

Banks, Trust Companies, etc.

Reg. 89. "Gross Income" of banks, trust companies, building and loan associations, brokers, finance companies, dealers in commercial paper, and persons engaged in the business of lending money or credit and other businesses of similar nature shall be deemed to mean "gross earnings" in respect to that part of the total gross income of such persons which is derived from such business and activity, and such gross earnings will be taxable at the rate of 1%. All taxpayers named herein will be required to attach Schedule "C" to gross income tax returns as set out in Reg. No. 87.

Reg. 89a. Gross Receipts of Banks, Trust Companies, etc.—Any taxpayer who is permitted to make return of his gross income tax under Section 1 (g) or (h), that is, upon his gross earnings, or as a domestic insurance carrier, can not include any income under that class which has been realized on account of businesses and activities not so classified.

Therefore, any taxpayer classified under Section 1 (g) or [fol. 201] (h), but who has other activities or carries on a business such as operating a farm, store, office building, apartment house, and/or any other kind of business will be required to report any gross receipts from such other business in the same manner as all taxpayers engaged in such other businesses are required to report, and can not include or intermingle such other gross income with the gross earnings from the businesses so set out in Section 1 (g) or (h).

This will be true whether or not the taxpayer has been forced to acquire such business through foreclosure or to otherwise take over the property which he operates or

whether it is operated by or through a trustee. (Approved September 25, 1934.)

Reg. 90. National Banks will not be required to make gross income tax returns for gross receipts from business done strictly under their national bank charter.

Reg. 91. National Bank Stock.—Tax on sale of national bank stock and dividends—Section 5219 of the revised statutes of the United States—provides: "* * * (D) In case the dividends derived from said shares are taxed, the tax shall not be at a greater rate than is assessed upon the net income from other moneyed capital. The gross income tax Act provides that the proceeds from the sale of property either tangible or intangible, and all receipts by reason of the investment of capital shall be taxable under said Act. The shares of stock of national banks held by a taxpayer is individual property and, when sold, the proceeds arising therefrom must be included in his gross receipts for taxation since imposing this tax upon such gross receipts is not imposing a tax that is greater than that being imposed upon the proceeds of other property of like kind.

It is therefore held that the taxing of dividends and of the [fol. 202] proceeds from the sale of national bank stock is not a violation of the United States statutes concerning the taxing of the proceeds of national banks and that the proceeds received by either an individual or a corporation on account of the sale of national bank stock, or dividends received on account of the holding of such stock are taxable gross receipts under the Indiana Gross Income Tax Act and are taxable in exactly the same manner and at the same rate as proceeds from sales or receipts of dividends of other corporate stock, and must be reported by a taxpayer having income from either or both of such sources.

This ruling likewise applies even though the national bank is operated entirely outside the State of Indiana.

Insolvent Banks

Reg. 92. Receiver or Agents of Liquidating Banks will be required to report the gross earnings of the banks for which they are appointed and include therein all interest, rentals, discounts and all other gross earnings collected or realized if in excess of the exemption, regardless of the

fact that such interest or rentals or gross earnings are collected or realized upon contract made and entered into prior to their appointment.

Reg. 93. Distribution to Depositors.—Any amount distributed to a depositor not in excess of the amount of his deposit by a bank either in voluntary or forced liquidation will not constitute taxable gross income.

Reg. 94. Receivers, Conservators and Employees of Insolvent National Banks.—Receivers, conservators and employees of national banks in receivership, in liquidation or under the control of the comptroller, are not employees of, or are they paid by the United States government and such services are only occasional and temporary. It is there- [fol. 203] fore held that all compensation received by them for such services is taxable under the gross income tax law of Indiana.

Article 23

Building and Loan Associations

Reg. 95. Semiannual Returns.—Building and loan associations will be taxable under the gross income tax Act upon their gross earnings and will be required to make their reports semiannually, that it, on the closing as of June 30th and December 31st of each year, and such semiannual returns shall be made on or before July 15th and on or before January 30th. The second semiannual return will be the annual return and upon such annual return will be reflected the income of the association for the entire year and tax computed thereon at the rate of 1%. Any tax previously paid for the annual period will be credited upon the tax computed on the annual return. Schedule "C" must accompany all gross income tax returns made by any such associations.

Article 24

Mortgages

Reg. 96. When a mortgage is only security for promissory notes, the receipt of the mortgage money by the mortgagor and the return of the money to the mortgagee will not be included in gross receipts: Provided, however, When property is mortgaged for the purpose of sale and the avoid-

ance of tax, the receipt of the mortgage money by the mortgagor (or seller) will be considered as a payment on the sale price of the property so sold as though the money had been paid by the purchaser.

Reg. 97. Mortgage Bonds.—The sale of bonds is a sale of intangibles as stipulated in Section 1 (f) of the Act; [fol. 204] therefore, the proceeds from the sale thereof must be included as taxable gross income.

Reg. 98. Foreclosure.—Whenever property is sold under decree or order of court, whether by foreclosure or on an order to sell, by an administrator or receiver and the property is bid in by the mortgagee for an amount not in excess of the original mortgage, including the costs occasioned by the order of foreclosure and sale, in such cases no gross receipts will be considered to have been received by the mortgagor, administrator, receiver, trustee or guardian.

Reg. 99. Cancellation of Mortgage.—Where a mortgagor deeds his property to a mortgagee and no consideration is given for said deed other than the surrender and cancellation of the mortgage then, in that event, neither the mortgagor nor the mortgagee has any gross receipts from such transaction returnable under the gross income tax law.

Reg. 100. Sale of Mortgaged Property.—Taxpayers selling property upon which there is a mortgage lien will be deemed to be selling only an equity therein when the mortgage lien is assumed by the purchaser, and only the amount received in cash, notes or other property will be reported for gross income tax. In all such cases the lien must actually exist against the property so sold. However, when a taxpayer sells mortgaged property and uses the proceeds from such sale to satisfy the lien against it he will be considered as having taxable gross receipts in the full amount of the sale price.

Article 25

Dealers in Securities

Reg. 101. Definition.—A dealer in securities as herein used is any taxpayer, whether an individual, partnership or corporation, with an established place of business regu- [fol. 205] larly engaged in buying and selling securities for

customers. Taxpayers who buy and sell or hold securities for investment or speculation irrespective of whether such buying or selling constitutes the carrying on of a trade or business, and officers of corporations and members of partnerships who in their individual capacities buy and sell securities for themselves or for the firms, are not dealers in securities within the meaning of this rule.

Reg. 102. Rate of Tax; Gross Earnings.—A taxpayer who is a dealer in securities will be considered under the provisions of Section 3 (e) "* * * any other business of a similar nature, * * *" and will be taxed upon his gross earnings at the rate of 1%. Dealers in securities must attach Schedule C to gross income tax returns. A dealer in securities having gross receipts from sources other than dealing in securities will not be permitted to report such other gross receipts on the gross earning basis.

Article 26

Stocks, Bonds and Dividends

Reg. 103. Bonds.—The sale of bonds is the sale of intangibles and must be reported for gross income taxation at the rate of 1% upon gross receipts from such sales. Amounts received upon maturity of all bonds and of certain preferred stocks will not constitute taxable gross receipts to the holder thereof. All amounts of interest received, credited, made available for withdrawal or received as a part of the sale price as premium must be included for taxation. Receipts from the sale of certain bonds are exempt as is the interest thereon, according to the table in Reg. No. 62.

Reg. 104. Stocks Sold Outright.—The full sales price of stocks sold outright must be reported by the taxpayer [fol. 206] as taxable gross income at the rate of 1%.

Reg. 105. Marginal Transactions.—Any taxpayer dealing on margin will report his gross earnings from such transactions. Gross earnings in such cases will be the profits realized, whether received or credited to his account, where stock is sold for an amount in excess of its cost, without any dedu-tion for losses incurred when stock is sold for an amount less than cost, and also without any

deductions for taxes, brokerage commissions or other expenses incident to the transaction.

Reg. 106. Stock Received as Wages, Commissions, or Payment for Services or Sales Price of Property.—When stock or other securities is accepted by a taxpayer as bonus, wages, commissions, payment for services, or other emoluments, or for the sales price of property, the receipt thereof will constitute gross income to the taxpayer.

Gross income will be measured for taxation by the actual value of the stock or securities at the time of acceptance. By "actual value" is meant the market value of such stock or securities. If the stock or securities have no determinable market value, they will be included in taxable gross income for whatever amount they are accepted as payment.

The Department of Treasury will in all cases reserve the right to fix and determine the amount for which such stock or securities shall be included in returns for taxation.

Department Regulation No. 106, approved July 31, 1934, is hereby revoked and superseded by this revision and amendment. (Approved: October 1, 1935.)

Reg. 107. Dividends.—Dividends received upon capital stock are taxable gross income whether received by an individual stockholder or by a corporation on its holdings in another corporation.

[fol. 207] Dividends permitted to accumulate or which are applied to a stockholder's debt or credited to his account will be considered to have been received by the stockholder in the period in which such dividends were made available for withdrawal and must be reported for taxation on gross income tax returns.

(a) Stock Dividends. Dividends received in additional stock of the declaring corporation will not be subject to gross income tax.

(b) Insurance Policy Dividends. Dividends issued to policyholders are taxable gross income when received in cash, but when applied to the purchase of insurance or to the reduction of premiums to be paid they will not be considered as taxable gross income.

Article 27

Notes and Other Intangibles

Reg. 108. Face Value; Interest.—When notes are accepted in lieu of cash for the transfer of title to property, for services or for any income whatsoever they must be reported for taxation at their full face value in the period when accepted, but amounts received in payment thereof will not be taxable, except that any interest thereon must be reported for taxation in the period when received.

Reg. 109. Notes Accepted Prior to May 1, 1933.—Promissory notes (except conditional sales notes) accepted prior to the effective date of this law will not be reported for taxation when payment thereof is received after such date, except that any interest received after said effective date must be reported.

Reg. 110. Conditional Sales Notes.—Conditional sales notes will not be reported for taxation when accepted, [fol. 208] but any payments received on the principal of the notes which would constitute the sale price of the article sold, together with any interest thereon, must be included for gross income tax in the period when received, whether the sale of the article was made before May 1, 1933, or subsequent to that date.

Reg. 111. Sales of Notes.—The sale of a note, either conditional or otherwise, is a sale of an intangible as set out in Section 1 (f) of the gross income tax Act and the full sales price received therefor must be reported for taxation regardless of the fact that the face value of such note or any payment thereon might have been previously reported upon gross income tax returns in the period when received.

Reg. 112. Notes for Borrowed Money; Interest.—The receipt of borrowed money is not taxable to the borrower nor is the receipt of the repayment thereof to the lender, and notes taken in evidence of money loaned are not taxable gross receipts, except that when such notes are sold or transferred the full sales price thereof must be reported for gross income taxation at the rate of 1%. Interest on loaned money is taxable gross income and must be reported on gross income tax returns in the period when received.

Reg. 113. Sale of Collateral.—Whenever it is necessary for a lender to make sale of any collateral property, either tangible, or intangible, which has been pledged or assigned for a loan, then the entire gross receipts realized from the disposition thereof will be taxable income to the owner thereof. Whenever property is sold by or for another the gross receipts realized therefrom must be included in the return of a taxpayer as his gross receipts under the Indiana Gross Income Tax Law.

[fol. 209] Reg. 114. Tax Anticipation Warrants.—When tax anticipation warrants issued by the governing body of a municipal corporation in the state are accepted by any taxpayer for the full amount or a part of the selling price for property, for services or as any income in lieu of cash, such taxpayer accepting such warrants will be considered to have taxable gross receipts of the value of the warrants so accepted.

Proceeds from the sale or redemption of such warrants are exempt from the gross income tax, but any interest or premium received thereon will be taxable income to the holder and must be included on gross income tax returns for taxation.

Reg. 115. Other Intangibles.—Gross receipts from the sale of intangible property are taxable at the rate of 1%. The term intangible property includes notes, stocks in either foreign or domestic corporations, bonds, debentures, certificates of deposit, accounts receivable, brokerage and trading accounts, bills of sale, conditional sales contracts, chattel mortgages, real estate mortgages, written contracts for the payment of money, certificates or other instruments evidencing an interest in property or rights, final judgments certificates of sale and any and all other intangibles capable of being transferred, acquired or sold. The situs of the intangibles shall have no bearing upon the taxability of the receipts for the sale or transfer thereof.

Article 28

Livestock Dealers and Farmers

Reg. 116. Dealers; Stockyards.—A taxpayer dealing in livestock within the confines of a stockyard under the federal jurisdiction will be considered under the provisions of Sec-

[fol. 210] tion 3(e) "* * * any other business of a similar nature * * *"—"* * * engaged in the business of lending money or credit * * *" (Section 1 (g) and will be taxed upon his gross earnings at 1%.

Reg. 117. Commission Buyers.—Any taxpayer engaged as a buyer of livestock for others and who is operating with other than his own capital and who is paid a commission will be required to report only his gross commissions for taxation at the rate of 1%.

Reg. 118. Sales of Livestock.—Farmers selling to commission firms or others will be required to include for gross income taxation at the rate of ¼ of 1% the entire sales price of livestock sold, and such gross receipts may not be reduced on account of any yardage, or sales commissions, insurance, feeding charges, trucking charges or any other expenses paid incident to the sale.

Reg. 119. Rate of Tax.—Sales of livestock will be regarded as wholesale sales and the rate of ¼ of 1% shall apply to the entire sales price thereof.

Reg. 120. Rates of Taxation on Farm Receipts.—A taxpayer engaged in the business of agriculture, including the production of livestock, poultry, eggs or any other product of the farm, orchard, garden or greenhouse shall reflect in his gross income tax return his gross receipts from the sale of such products, on which he will be taxed at the rate of ¼ of 1%: Provided, however, the agriculturist who deals in or produces any such farm products and sells same to a consumer will be deemed to be selling at retail and will be taxed at the rate of 1%, as will also receipts from sales of equipment or chattel property. (See Reg. 49.)

Reg. 121. Gasoline Tax Refunds.—Any taxpayer receiving refund of gasoline tax will not be required to include the [fol. 211] amount of such refunds in his report of gross income.

Reg. 122. Exchange of Farm Products.—Farmers exchanging farm products for merchandise will be deemed to have sold such products and will be required to include the value of the merchandise received for products so exchanged in his gross income tax return. (See Reg. 72.)

Article 29

Salaries and Wages

Reg. 123. Rate of Taxation.—All salaries and wages, except those paid federal employees, are taxable under the gross income tax Act at the rate of 1%.

Reg. 124. Public Officials.—Salaries of any state, county or municipal officer or employee in whatsoever capacity employed are taxable under this Act at the rate of 1%.

Reg. 125. Official Expenses.—(See Reg. 68.)

State employees having mileage and traveling expenses paid by the state may deduct amounts received in reimbursement therefor in their gross income tax returns.

County officials may deduct from gross income only such amounts as are received by them as repayment of expenditures made for the county which will not include any amounts paid to deputies by such officer, but any and all moneys received for payment of personal expenses or their personal compensation must be reported for taxation.

Amounts received by county sheriffs in repayment for mileage in transporting persons to state institutions or for other county expenses wherein they are required to file a bill for the same will not be considered taxable gross income, but any amounts received by such sheriffs as per diem in attendance in any court must be reported for taxation.

Reg. 125a. Reimbursement of County Sheriffs for Feed- [fol. 212] ing Prisoners.—Volume 10, Burns Revised Statutes, Supplement of 1935, Chapter 13, Sections 49-1323 to 49-1326, provides for the feeding of prisoners by the County Sheriff and fixing allowances therefor. Under the revised Act the Sheriff of every County in this State having a population of less than 200,000 will be allowed the sum of not to exceed 20¢ per meal for each person in his charge, the Sheriff of each and every county in the State having a population of 200,000 or more will be allowed a sum not to exceed 13½¢ per meal. The exact amount which the Sheriff is allowed in each case is fixed by the State Examiner of the State Board of Accounts, on and before the 15th day of June of each year. The amount so fixed shall apply to the year beginning on the 1st day of July next succeeding.

It is further provided that the Sheriff shall submit to the Board of County Commissioners an itemized statement un-

der oath showing the names of the prisoners and the date that each was in prison and the number of meals served to each such prisoner. The County Commissioners are authorized to allow the Sheriff's claim and the County Auditor is authorized to draw his warrant upon any appropriation therefor as for other county expenses.

It therefore appears that any amounts received by Sheriffs for the feeding of prisoners which do not exceed the amounts expended by them for such purpose is merely reimbursement of county expenses incurred and may be eliminated in the Sheriff's individual return. However, any difference between actual expenditures for such purpose and the amount received from the county must be included for taxation.

This ruling shall be effective from October 1, 1935, and subsequent returns, examinations and assessments shall be made in accordance herewith. (Approved October 31, 1935.)

[fol. 213] Reg. 126. Bonuses.—Bonuses will be considered additional compensation for services rendered and will be taxable to the recipient in the period in which they are received or made available for withdrawal.

Reg. 127. Deductions for Pensions or Retirement Funds.—When deductions are taken from salaries or wages for the establishment of pension or retirement funds, or any fund in which the employee may have a future interest, the employee must report for gross income taxation the full amount of such salary, wages or bonuses without any reduction whatsoever. (See Reg. 71.)

Reg. 128. Tips, Marriage Fees, Mass Fees, Baptismal Offerings received by persons for services rendered incident to their employment are taxable income to the recipient at the rate of 1%.

Reg. 129. Gambling.—Money received on account of wager or game of chance will be considered gross income and must be reported for taxation without any reduction on account of losses incurred.

Article 30

Income Not Reduced to Possession

Reg. 130. Constructive Receipts.—Interest coupons, dividends, interest on savings accounts and bank deposits, com-

missions and salaries for services or items of income from any source whatsoever maturing to the credit of or becoming due a taxpayer but not actually reduced to possession, but which has matured, become due or has been unconditionally credited to the account of, or set apart for, any taxpayer, and which may be withdrawn by him at his own election at any time, will be subject to gross income tax for the period in which such amounts are so credited, set apart or become available for withdrawal. Amounts earned [fol. 214] by or becoming due from any source to any taxpayer which are credited to his debit account for a reduction thereof shall be considered as having been actually received by such taxpayer within the period so credited. Any substantial limitations or conditions of withdrawal of any amount will defer the tax liability upon the same until the time that such limitations or conditions are removed or satisfied. If, however, items matured or credited to a taxpayer's account are not available for withdrawal for the reason that there are no funds out of which to make payment they will not be taxable until such a time as the funds are available to the taxpayer.

Reg. 131. Income Paid to Third Party.—Whenever a party has a right to receive income which would be taxable to him when received he cannot escape taxability on account of such money being paid to another for his benefit.

Example: A leases property to B for a stipulated rental. A becomes indebted to C for a sum of money which he directed B to liquidate by paying to C the rental money due A. A would be taxable on the entire amount of rent received from B direct, together with the amount of money B paid to C for A's benefit.

Reg. 132. Board and Maintenance; Living Expenses.—Where living expenses are furnished an employee by his employer as a part of agreed compensation to employee, and a stated and agreed value is placed upon such living expenses and are accepted by the employee in lieu of additional compensation, such living expenses, shall be included by employee as taxable gross income at the stated and agreed value thereof, and if no stated value is set then such living expenses furnished the employee must be included and reported by him for gross income taxation at a fair cash value thereof, together with his taxable gross receipts from [fol. 215] other sources.

Article 31

Joint Interest in Income

Reg. 133. Joint Returns.—Joint returns by husband and wife are not provided for in the Act and each will be required to report and pay tax upon the income rightfully received or credited to them, and each shall be entitled to their individual exemption. No division or separation of their incomes for the purpose of reduction of the same will be permitted.

Reg. 134. Income from Estates by Entirety.—The gross receipts from the sale or rental of real or personal property, tangible or intangible, or interest, dividends or any return on the investment of an estate held by entireties by a husband and wife, the title to which was vested in them during their marriage and which cannot be disposed of by either without the joinder of the other, may be reported by the husband and wife in their individual capacity, each reporting one-half of the proceeds and each being entitled to an exemption of $1,000 for any taxable year.

Reg. 135. Joint Tenancy. — Gross receipts of rentals, other earnings or from sale of property owned in joint tenancy will be reported for gross income taxation in their individual returns by each of the joint tenants in the proportion of their respective shares.

Article 32

Landlord and Tenant

Reg. 136. Rentals.—All rentals will be considered as gross income of every person engaged in any business or activity not enumerated in sub-sections (a) to (e) "* * * [fol. 216] and all receipts from any source whatsoever * * *" and must be included for gross income taxation at 1%. Rentals received from a state or federal government or from departments or subdivisions of either are not exempt from gross income tax and must be included for taxation.

Reg. 137. Crop Shares.—When land is farmed by a tenant on the "grain rental" plan the landlord's proceeds from the sale of his share will be taxable to him at the same rate

and under the same provisions as apply to agriculturists, whether the crop is sold by himself or by his tenant.

The receipt by the landlord of his share of the harvested crop is not taxable to him, but any sale made by him of such farm product is taxable under requirements set out in Reg. 120.

Provided, however, That when land is rented for cash the rental received will be taxable at 1% whether received in cash or crops in lieu thereof.

Reg. 138. Utility Charge Deductions.—That part of utility charge which is included in the rental consideration is gross receipts subject to taxation. However, if the utility consumption of the renter is greater than the maximum consumption allowed in the rental contract, and the owner, as a matter of convenience, merely collects for the utility, the amount of the charge in excess of maximum allowed in the rental contract will be a non-taxable receipt.

Article 33

Municipal Utilities

Reg. 139. The gross receipts derived from the operation of a utility, which utility is operated as a department of a municipality, must be included for taxation under the gross income tax law.

[fol. 217] The gross receipts for services or facilities rendered other departments of the city by such utility department will not be considered as gross receipts of the utility for taxation under the gross income tax law.

The entire gross receipts of a utility corporation which has been organized as a municipal corporation, the common stock of which is held by the municipality, will be included for gross income tax purposes in the return of the municipal utility corporation.

Such gross receipts will include all amounts, received from the operation of the utility, all amounts received from the sale of its services or facilities to the city or any departments thereof, all amounts received as rental from the leasing of its services or facilities and all amounts paid to a third party to be applied on or as a reduction of bonded indebtedness or other obligations of such municipal corporation.

Article 34

Transportation and Communication

Reg. 140. The gross receipts derived by railroads, interurbans, pipe line, bus and truck lines from carrying charges of passengers, including Pullman service on sleeping and dining cars, freight and telephone or telegraph messages originating in the State of Indiana, the destination of which is outside of the State of Indiana on a continuous conveyance or which originated outside the State of Indiana and terminated therein, will not be included in gross income tax returns.

Article 35

Grain Dealers

Reg. 141. Track Buyers; Commission men; Warehouse-[fol. 218] men.—A taxpayer dealing in grain as a track buyer (buying on track or to arrive), a commission man or warehouseman will be considered under the provision of Section 3 (e) "* * * any other business of a similar nature * * *" (in the business of lending credit, Section 1 (g) and will be taxed upon his gross earnings at 1%.

Article 36

Exempt Organizations

Reg. 142. Certain corporations, companies, associations, orders, leagues and societies may be exempt from gross income tax, depending upon their organization structure and disposition made of their income as set out in Section 7 (b) of the gross income tax Act.

Reg. 143. Insurance Companies.—Insurance companies who pay the State of Indiana a tax of more than 1% upon pre-iums levied under the provisions of the laws of this state will not be required to pay gross income tax. (Law, Section 7 (a).)

Reg. 144. Application for Exemption.—Every company or organization that believes itself to be exempt under this law will be required to file with the Department of Treasury a full statement of facts under oath, setting out its articles of incorporation and a full statement of activities and

disposition of its income, such application being subject to review by the Department of Treasury, and if it is found that such organization should be exempted, a certificate of exemption will be issued showing exemption granted. However, no organization will be presumed to be exempted from gross income tax until this regulation has been complied with.

(a) Insurance Companies qualified under the provisions of Section 7 (a) will be deemed to be automatically exempt and no showing of exempt qualifications need by made to [fol. 219] the department. Such insurance companies are not, however exempt from making and filing information returns as provided in Reg. No. 166.

Article 37

Fiduciaries

Reg. 145. Estates and Trusts.—Estates and trusts are designated as taxpayers under the gross income tax Act of 1933 and such tax shall apply to the gross income of a trust or estate derived from earnings on the corpus, from sales of property, or other income received from any and all sources (except exempt income).

Reg. 146. Administrators and Executors.—The liability for filing gross income tax returns and paying the tax due on a decedent's estate is strictly imposed upon administrators, executors or other persons having charge of the settlement of an estate, and the provisions and requirements concerning the filing of gross income tax returns and paying tax thereon that apply to individuals or other taxpayers shall apply to such administrators, executors or persons, except that all returns must be filed on the basis of a calendar year, no permission being granted for filing on a fiscal year basis. The period for filing such returns shall begin with the date of the decedent's death and not the date of appointment of the administrator or executor. The fact that all or a part of the heirs or beneficiaries are non-residents of the State of Indiana, or that all or any part of the estate is willed to or held for an organization or institution that is exempt from gross income tax, will not relieve fiduciaries from reporting and paying tax upon the gross receipts from the sale of or earnings on any such part of the estate.

Reg. 147. Exemptions.—The same exemption allowed an [fol. 220] individual taxpayer may be taken by an administrator, executor, trustee, commissioner, guardian or other fiduciary upon the gross income tax return for the estate or trust, subject to the same limitations and provisions for fractional parts of the year as set out for individuals, and exemption will be taken upon the return only in proportion to the time computed from the date of the death of the decedent to the end of the taxable year. When a fiduciary files final report to the court before the expiration of the taxable year, if he should find that gross income tax is due, a final gross income tax return must be filed and tax paid. Such return will be as an annual return subject to the requirements for individual or other taxpayers and exemption may be taken at the rate of $83.33 per month from the date of the decedent's death in the taxable year to the end of such year regardless of the unexpired portion thereof. Any tax previously paid in such taxable year will be credited.

Reg. 148. Sale of Property to Pay Debts.—Whenever an administrator or executor sells property under decree or order of court for the purpose of making assets to pay debts of the estate, no gross receipts will be considered to have been received by such administrator or executor to the extent of the amount actually used for paying such debts, and only the unused residue of the sales price will be subject to gross income tax. However, this shall not be construed to mean that debts of the estate may be deducted when sufficient funds are available to pay such debts without sale of property to make assets for such purpose. No costs or expenses incident to the administration or management of an estate may be deducted by the administrator or executor in the gross income tax return for the estate.

Reg. 148a. Debts of Decedent Deductible on Estate Re- [fol. 221] turns.—(a) When property of an estate is sold to make assets to pay debts Gross Income Tax will not attach to the amount of the sale price used to pay the following:

(A)

1. All debts incurred by the decedent during his lifetime.

2. Funeral Expenses.
3. Medical expenses.
4. Property taxes only if the property value was fixed and assessed on the property of the decedent before the date of death.
5. Federal estate taxes.

The following are not deductible :

(B)

1. Inheritances taxes.
2. Property taxes where the value is fixed after date of the decedent's death.
3. Administrator's fees.
4. Attorney's fees.
5. Court costs.
6. All other obligations incurred in the management or operation of the estate.

When sufficient funds are available to pay such debts scheduled in "A" without sale of property to make assets for such purpose no deduction may be taken. Unless property is sold for the purpose of making assets to pay debts listed under "A" Gross Income Tax will attach to the full sales price received. In any event that part of the sales price of property not used for paying debts under "A" will be taxable. Administrators and executors are always required to pay tax on the sales price of property sold to make assets for distribution. (Approved September 22, 1934.)

Reg. 149. Decedent's Unreported Income.—Within a reasonable time after a decedent's death, the administrator, [fol. 222] executor or person having charge of the settlements of his estate will be required to file gross income tax returns for such decedent if the same would be required of such decedent had he lived. If the decedent were required to file an annual gross income tax return for an expired taxable year and failed to do so, such administrator, executor or person shall file the same for him and shall include upon such return all income received by or credited to him during the said past taxable year. Executors, administrators and persons having charge of a decedent's estate will also be required to make gross income tax returns for such de-

cedent covering the expired portion of the current year in which his death occurred and include thereon all of decedent's income received by him in the expired portion of the current taxable year and all deferred income which would have been received by such decedent had he lived, and all his unpaid accounts receivable at their inventoried value, regardless of the fact that such decedent may have been reporting on the cash basis. This shall not be construed as a requirement for a change of basis of reporting, but is required for the reason that such return will be a final return. Such current return shall be as an annual return and shall date from the first day of the current taxable year to the date of the decedent's death and may be filed at any time in the current taxable year prior to the expiration thereof, or if the administrator or executor is filing his final report to the court at the end of the optional six months' period (Acts of 1931) such decedent's return must be filed on or before such time as a final report is made. Exemptions may be taken upon the return at the rate of $83.33 per month from the date of the beginning of the decedent's residence in the state in the taxable year to the end of such year regardless of the unexpired portion thereof and any tax formerly paid by the decedent on quar-
[fol. 223] terly returns in such taxable year will be credited.

Reg. 150. Trusts.—Trustees must make gross income tax returns and pay gross income tax upon all gross income derived from earnings on the corpus of the trust, from sales of property, and all other income from any and all sources (except exempt income) whether such trusts are created by will, declaration of trust or implication of law, and the same provisions and requirements concerning the filing of gross income tax returns and paying tax thereon that apply to individual or other taxpayers shall apply to such trustees. Trustees shall file only one return for a trust without regard to the number of beneficiaries and only one exemption thereon may be taken.

Reg. 151. Commissioners.—Commissioners appointed by courts for the purpose of making sale of property in partition proceedings will be required to make gross income tax returns and pay tax upon the entire gross receipts from sales of property so sold by them, and no deduction of any expenses incident to the proceedings may be taken.

Returns shall be filed and tax paid in the same manner and upon the same basis as an individual or other taxpayer.

Reg. 152. Guardians.—Guardians will be required to make gross income tax returns and pay tax upon amounts received, including earnings on or from sales of property held in trust, under the same regulations applying to other fiduciaries.

Reg. 153. Distributees.—When gross income tax has been paid by an administrator, executor, trustee, commissioner, guardian or other fiduciary, upon amounts to be distributed to heirs of decedents' estates, trustors or beneficiaries of trusts, wards of guardians and parties to partition suits, such amounts will not be deemed to be taxable gross re- [fol. 224] ceipts to such heirs, trustors, beneficiaries, wards and parties when received by them. Heirs or beneficiaries of decedents' estates, trustors or beneficiaries of trusts, wards of guardians and parties to partition suits who are residents of Indiana will be required to report for gross income taxation all gross receipts of distributive shares received from non-resident trusts or estates when such receipts are proceeds from earnings on or from sale of property, if gross income tax has not been paid thereon by the fiduciary for such non-resident estates or trusts. However, property received from a non-resident estate in the same form as left by the decedent will not be considered taxable gross income to such resident beneficiary or heir.

Reg. 154. Inventoried Corpus.—The inventoried corpus of an estate or trust passing into the hands of the fiduciary upon his appointment will not be considered gross income to such fiduciary and will be excluded from his returns. Unpaid accounts receivable or other deferred income which would have been received by the decedent had he lived, or which would become a part of the inventoried corpus of a decedent's estate, must be reported upon the decedent's return as set out in Reg. No. 149, but the subsequent receipt of or payment of the same will not be considered taxable gross income to the administrator or executor.

Reg. 155. Inheritances.—Receipts by heirs or beneficiaries of cash, or property in the same form as left by a decedent, title of which passes by descent with or without appointment of executor or administrator, will not be

considered taxable income to such heir or beneficiary, but the gross income received from the subsequent sale thereof will be taxable.

Reg. 156. When No Returns are Required.—Gross in-[fol. 225] come tax returns for estates, trusts and decedents will not be required when the gross income of such estate, trust or decedent in any taxable period hereinbefore designated does not exceed the exemption granted to taxpayers.

Reg. 157. Certified Copy of Letters; Examination of Return.—All fiduciaries herein will be required to submit to the gross income tax division, department of treasury, certified copies of their letters of appointment before they will be permitted to examine or obtain information concerning gross income tax returns of decedents, heirs, wards, trustors, beneficiaries or other parties for whom they are acting.

Reg. 158. Returns for a decedent for past taxable year should be filed promptly after the death of decedent in order that any refund which might be due the decedent on account of overpayment of tax on prior quarterly returns may be received by the administrator or executor and be credited to the estate.

Receivers and Trustees

Reg. 159. Receivers and Trustees.—Receivers and trustees appointed by courts will not be required to make gross income tax returns of the proceeds from the sale of assets sold in liquidation. However, receivers and trustees will be required to make returns and pay tax on gross receipts derived from sales of products or property purchased for the purpose of making sale thereof and on gross receipts from operations of the business as a going concern.

Reg. 160. Exemption on Final Return.—Receivers making final returns for any period other than a full taxable year will be entitled to make an exemption at the rate of $83.33 per month beginning with the date of their appointment in the taxable year to the end of such year regardless of the unexpired portion thereof, and the receiver in mak-[fol. 226] ing the final return will make such return as though it were an annual return and will include, together with the current gross receipts, all other receipts reported in the prior quarterly reports within said year.

Reg. 161. Distribution.—All persons, firms or corporations receiving a distribution from receivers or trustees will be required to include such receipts in their gross income tax returns unless such receipts constitute a return of borrowed money.

Reg. 162. "Bankrupt Sales."—The gross receipts from sales made by any person, firm or corporation purporting to be a bankrupt sale (not by a trustee in bankruptcy) will be taxed in their entirety under the gross income tax law.

Reg. 163. Requiring Receivers, Trustees and Assignees to Make Returns for Corporations.—Receivers, trustees in dissolution, trustees in bankruptcy and assignees assuming control of the property or business of a corporation must make returns for gross income tax for such corporations on corporation forms if such gross receipts are in excess of the exemption allowed by law. The fact that the powers and duties of the corporation are suspended and temporarily in the hands of receivers, trustees, or assignees will not remove responsibility for making returns for gross income, and such receivers, trustees and assignees, subject to order of court, shall be deemed to stand in the place and stead of the corporation officers and will be required to perform all the duties and assume all the liabilities which would be imposed upon the officers of the corporation were they still acting as such.

A receiver, truste or assignee will be required to make a gross income tax return of receipts from operation of the corporation for which he is appointed, for the taxable period [fol. 227] subsequent to his appointment and include in such return the gross receipts from any unreported period of the corporation, and such receiver, trustee or assignee, if in control of such corporation at the end of the taxable year, shall make an annual return, and if the period that such receiver, trustees or assignee is in control of such corporation is less than one year then such return shall include the entire gross receipts of the corporation for the entire taxable year.

The fact that receivers, trustees or assignees are relieved from making gross income tax returns for receipts from the sale of assets under the rulings of this department will not affect the requirements of filing gross income tax returns in cases herein provided for.

Article 38

Secrecy of Returns—Power of Attorney

Reg. 164. Secrecy of Returns.—Section 21 of the gross income tax Act provides that the department of treasury shall not divulge the gross income or the amount of tax paid or any other information reflected or disclosed in any taxpayer's return. Taxpayers may examine their own returns at the department of treasury, but no taxpayer's return will be shown nor will any information reflected thereon be revealed to any other person unless a fully executed power of attorney is presented to the department.

While examination may be obtained by a judicial order, yet such release of information concerning any tax return will be confined to an action in which the taxpayer himself is involved relating to the matter of his own gross income tax. The taxpayer is protected further against divulging of information by heavy penalties which may be imposed upon [fol. 228] the department's employees for so doing.

Warrant claim for refund (Form 110-L) will not show the total amount of tax paid by the taxpayer, but only the amount of refund made.

Reg. 165. Power of Attorney.—Since Section 21 of the gross income tax law prohibits the divulging of any information by an employee of the department of treasury, disclosed by reports filed under the provisions of this Act, no conferences concerning any particular return may be had except with a taxpayer or with attorneys or agents duly authorized to represent the taxpayer before the department.

All Persons Appearing as Attorneys or Agents to Represent Taxpayers Must First Have Filed a Power of Attorney

No attorney or agent representing taxpayers, either individual or corporate, shall be recognized as having any right to any information contained in any return or the findings of the department thereon, or be informed of the proceedings, or pending claims or other matters unless said attorney or agent representing the taxpayer shall have first filed a power of attorney, in proper form, authorizing him to appear before the department of treasury for the State of Indiana to represent the taxpayer and specifically directed

to inquire into and receive information concerning the tax reports so filed by such taxpayer.

If any agent or attorney appears before the department of treasury of the State of Indiana and shows for good cause that he has not had sufficient time or had not been informed of the rules concerning the filing of a power of attorney, but has in his possession certain facts pertaining to the report of his client, he may be permitted to present such arguments and evidence upon the understanding that a power of attorney will immediately be filed, and unless [fol. 229] such power of attorney is immediately filed the matters presented by the attorney or agent will not be considered in the case.

No power of attorney will be accepted unless it is in regular form and only one power of attorney shall be in effect in any case for any designated period whether it be for a quarterly period or periods or for a taxable year or years.

A power of attorney may recite and specify several persons as attorney or agent, but no other power of attorney will be accepted as having been filed, except and unless all previous powers of attorneys for the same period are revoked. It will be necessary that all powers of attorney recite fully the powers being granted to the agent or attorney, and while it is not necessary that it be in strictly legal form it must be either acknowledged before a notary public (not sworn to) or the signature thereto witnessed by two disinterested individuals.

The power of attorney will only be recognized and limited to such acts as are set out and specified therein. If an agent is to have the right of substitution or revocation, such right must be specifically given in the power of attorney.

If a power of attorney is executed by an individual to his agent or attorney it must be signed by him individually. In a case where a power of attorney is given by a partnership it must be executed in the name of the partnership by at least one member of the partnership. In case the power of attorney is given by a corporation it must be signed by the president of the corporation as such, attested by the name of the secretary and the corporate seal of the corporation and acknowledged or attested before a notary public by the president and secretary of such corporation. Any [fol. 230] officer other than the president having authority to bind the corporation may sign in place and instead of the president.

If a taxpayer is insolvent, deceased or dissolved, then powers of attorney may be accepted from any person who has been appointed by the court to take charge of the property or the business of said deceased, insolvent or dissolved taxpayer; however, such power of attorney must be accompanied by a certified copy of the appointment thereof. Any officer of a corporation may appear before the department of treasury concerning the corporate returns thereof without being required to file a power of attorney so to do.

No taxpayer will be permitted to file substitutes of powers of attorney except on the written consent of the attorney or agent of record, except that the period for which the power of attorney had been previously granted has expired then said taxpayer will be permitted to issue powers of attorney to other agents or attorneys for any subsequent period without the written consent of the former agent or attorney.

The department of treasury will cancel powers of attorney after, if according to agreements, the agent or attorney of record fails within a reasonable time to furnish evidence or data pertaining to the matters in controversy which such attorney agreed to furnish.

Article 39

Information Returns of Payments Made

Reg. 166. Information at Source.—Section 25 provides that the department of treasury shall promulgate rules and regulations not inconsistent with the Act for making returns and for ascertainment, assessment and collection thereof as it may deem necessary and desirable, and shall prescribe and provide all necessary and proper forms for the [fol. 231] enforcement thereof.

Section 26 authorizes the department of treasury to examine any books, records or other data which may have a bearing upon any return or for the purpose of making a return where none has been made, and may require, by summons, any person to appear as a witness and produce such books, papers, records or data of which he may have possession. Therefore, in order that any person having in charge books, papers, records or data relating to any return may not be occasioned any unnecessary inconvenience or hardships by being required to appear before the department of treasury in a great number of cases, it is being

provided that a return of information be made to the department of treasury.

Information Returns. All persons, firms, copartnerships estates, trusts, associations, corporations or any department of government of the State of Indiana, including towns, cities, townships, counties, school towns, school cities, school boards or municipal utility corporations, making payments of $1000 or more to any person within the period from January 1st to December 31st, inclusive, shall render a return thereof to the Director of the Gross Income Tax Division, Department of Treasury, 141 South Meridian St., Indianapolis, Indiana, on or before February 15th.

The return shall be made on Form No. 12 and supplemented by Form No. 11-A which shall be verified before an official authorized to administer oaths.

An information return will be due if the total amount paid to any one person exceeds $1,000 even though it may be made up of several items such as wages, salaries, commissions, bonuses, rents, royalties, or other emoluments, and if the amount paid on account of dividends and/or interest shall exceed the sum of $100.

[fol. 232] An information return is required to be made when interest and dividends are paid in excess of $100, even though no salary, wages, or other emoluments of any kind are paid to the same persons.

An amount retained by an employer and paid to a pension fund or to another for the benefit of such employee is to be included in such information return as though such sum had actually been paid to such employee, as such sums must be reported by the individual for the period in which such sums would have been paid to him if same had not been retained and paid to someone else for his benefit.

Where an amount is paid to some individual, but where in fact it is for the benefit of several individuals, the person by whom the payment is made is required to make a return of such payment upon an information return, and the person so receiving such payment must in turn make report of any distribution made by him by filing information returns before any credit may be received therefor.

Returns will not be required on account of the following payments:

1. Interest on obligations of the United States.

2. Payments by brokers to customers.

3. Payments of any kind made to a corporation.

4. Payment of bills for merchandise, freight storage, professional services, repayment of borrowed money, and other similar charges.

5. Payment of rent when made to a real estate agent. (The real estate agent, however, must make report of the amount that has been collected for the benefit of each owner or owners, regardless of whether the amount collected has been paid to such owner or owners.)

[fol. 233] 6. Payments made by the United States government to any person for any purpose whatever.

7. Partnerships need not report payments of any distribution of partnership interest to partners but must report salaries or contractual payments made to the partners and others.

8. Payments by Building and Loan Associations to stockholders as withdrawals, but dividends and interest payments must be reported.

In case a resident taxpayer receives any payment for which an information return would be required, if he was being paid by an employer within the State of Indiana, such taxpayer will be expected to have an information return filed by such employer even though such employer is located without the State of Indiana before final approval can be given to the amounts so reported by him as to salaries, wages, dividends, royalties, etc.

In a case where it is found to be impossible to file the information return within the time prescribed an extension will be granted until the 15th day of the next succeeding month after the return is due. The request for extension must be in writing and filed with the director of the gross income tax department on or before the last date prescribed for filing a return.

Article 40

Forms to be Used by Taxpayers Under the Gross Income Tax Act

Reg. 167. Forms and Schedule.—The following forms will be used by taxpayers in reporting gross income and information required by the department in relation thereto.

[fol. 234] These forms may be obtained from the Gross Income Tax Division, 141 South Meridian St., Indianapolis, from automobile license bureaus and other points of distribution.

Form No. 1. Partnership (quarterly) No. 1-a (Annual).
Form No. 2. Corporation (quarterly) No. 2-a (Annual).
Form No. 3. Partnership (quarterly) No. 2-a (Annual).
Form No. 8. Corporation Consolidated Return.
Form No. 9. Insurance Company (quarterly) No. 9-a (Annual).
Form No. 5. Instruction Sheet.
Form No. 7. Schedule "C".
Form No. 10. Allocation of Receipts from Multiple Business Locations.
Form No. 12. Information Returns of Payments to Employees.
Form No. 11-A. Summary of Payments to Employees.
Form No. 100-L. Application for Fiscal Year Basis.
Form No. 101-L. Application for Exemption.
Form No. 105-L. Affidavit for Domestic Corporation for Dissolution.
Form No. 106-L. Affidavit for Foreign Corporation for Withdrawal.
Form No. 114-L. Affidavit for Corporations Not Active after May 1, 1933, for Dissolution or Withdrawal.
Form No. 112-L. Power of Attorney (Individual).
Form No. 113-L. Power of Attorney (Corporation).
Form No. 111-L. Statement of Claim for Refund.

All forms for report of gross income for taxation (num- [fol. 235] bers 1 to 9-A, inclusive) are accompanied by instruction sheet (Form No. 5) containing information as to filling out and filing returns and bearing on the general application of the gross income tax Act.

Article 41

Passing the Tax on

Reg. 168. Since taxpayers are not made the agents of the state to collect gross income tax, any tax added and collected by a taxpayer must be considered as an additional price received, and will be part of the gross receipts of a taxpayer, and must be reported as taxable income.

Since the gross income tax Act is silent upon the matter of adding this tax to the selling price or charges, the adding

of such tax to such selling price or charges must be entirely a matter of contractual agreement between the buyer and the seller, and the department will therefore neither authorize the adding of the tax nor condemn the failure so to do, and only look to the taxpayer for the tax upon his gross receipts.

Article 42

Miscellaneous Occupations and Income

Reg. 169. Advertising.—Gross receipts from advertising such as display or bulletins, posters, commercial signs and radio advertising will be considered under the same classification as receipts from advertising by newspapers, periodicals and magazines, and such gross receipts will be reported for gross income taxation at the rate of one-fourth of 1%.

Reg. 170. Alimony.—Any money or property received as alimony other than property settlements will be considered [fol. 236] taxable gross income, except that any amount awarded for care of children will not be taxable. Amounts received in property settlements in which the recipient has an existing interest will be considered non-taxable income to the extent of such interest, but any excess of such interest must be included on gross income tax returns for taxation.

Reg. 171. Book Binders.—Book binders will be considered in the same classification as job printers and the gross receipts from sales to the consumer must be included for taxation at the rate of 1% and receipts from sales to others for resale at one-fourth of 1%.

Reg. 172. Barber and Beauty Shops.—Receipts from business of this nature will be classified as personal service and taxable at the rate of 1% upon all receipts from charges for tonsorial work and sales of supplies. All owners and operators of beauty or barber shops will be required to report the entire gross receipts of their shops for taxation without any deduction on account of commissions paid or expenses incurred.

Reg. 173. Consignment Dealers.—Consignees selling any property handled on consignment will be required to report and pay tax upon the entire proceeds from the sale

of such property the rate to be governed as set out in Reg. 21.

Reg. 174. Contractors.—The original contractor shall be required to report the entire amount received by him upon his contract and extras, whether the same is performed by himself or sub-let to another in whole or in part, and will be taxable thereon at the rate of 1%. When a contract or any part of a contract, is sub-let, the sub-contractor shall be required to include the entire amount received by him for the performance of his sub-contract and shall be [fol. 237] taxable thereon at the rate of one-fourth of 1%.

(a). Contracts with State or Federal Government. Money received for the performance of contracts with a state or the federal government, or any department, or subdivision of either, is not exempt under the gross income tax Act and must be reported for taxation.

Reg. 175. Damages.—Money received in settlement of property damage will not be taxable to the extent of the amounts used for replacement but any amounts not so used must be reported as taxable gross income for taxation at the rate of 1%.

The entire amount of personal damages or awards either on suit or by compromise or voluntary settlement will be considered taxable gross income and must be included for taxation at the rate of 1%.

Reg. 176. Dry-Cleaners and Laundries.—Laundries and dry-cleaners will be required to pay a tax upon their gross receipts at the rate of 1% except that when a laundry or dry-cleaner performs such service for other laundries or dry-cleaners or performs services for guests of hotels when the hotel is not acting as the agent for such dry-cleaner or laundry, the rate on gross receipts for services to laundries and dry-cleaners and hotels not acting as agent will be one-fourth of 1%.

Reg. 177. Greenhouses.—Gross receipts of greenhouses will be taxable at the rate of 1% from sales to the consumer, one-fourth of 1% upon receipts from wholesale sales.

Reg. 178. Hatcheries.—The gross receipts of hatcheries will be classified as receipts from wholesale sales and will be taxed at the rate of one-fourth of 1%. However, all re-

ceipts from charges for custom hatching will be classified [fol. 238] as receipts from personal services and will be taxable at the rate of 1%.

Laundries.—See dry-cleaners, Reg. 176.

Reg. 179. Job Printers.—Job printers, printing companies and newspaper publishers selling job printing to the consumer will be taxed upon their gross receipts therefrom at the rate of 1%. The gross receipts from all sales to others for resale will be taxable at the rate of one-fourth of 1%.

Reg. 180. Judgments.—Amounts received by judgments which would be exempt from taxation if paid without suit will not be taxable. Amounts received by judgment for property damage will be exempt from this tax to the extent of the amounts used for replacement of the property damaged. The entire amount received by judgment for personal damages will be taxable. In no case may reportable amounts be reduced for taxation on account of attorney's fees, court costs, or any other expenses incident to litigation.

Reg. 181. Ministers.—Ministers will be required to report their gross income for taxation at the rate of 1% and include all salaries, fees, contributions, maintenance, quarters, rentals furnished and other emoluments received in connection with their profession.

Reg. 182. Newspapers. — Publishing companies which market newspapers, magazines and periodicals through others are not deemed to be selling directly to the consumer and the tax on such gross receipts will be at the rate of one-fourth of 1%. Job printing work sold direct to the consumer must be included for taxation at the rate of 1%

Reg. 183. Photographers.—Photographers who take personal photographs will be considered as selling at retail for that part of their business and the 1% rate will apply. [fol. 239] If, however, they do commercial work for advertising agencies, or for manufacturers to be used in advertising, the receipts from such sales will be considered wholesale and taxable at one-fourth of 1%.

Reg. 184. Restaurants and Cafes.—Restaurants and cafes are deemed to be selling to the consumer and the gross re-

ceipts from such businesses will be taxable at the rate of 1%.

Reg. 185. Slot and Vending Machines.—The entire gross receipts of slot and vending machines will be taxable to the owner or lessor of the machine at the rate of 1% without deductions for "splits," rentals, or commissions paid to those in charge of the machine. Those persons in charge of such machines and receiving either "splits," rentals, commissions, or other remuneration of any kind will be required to pay tax at the rate of 1% upon all such "splits," rentals, commissions, or other remuneration received.

Reg. 186. Threshermen.—The gross receipts of threshermen are classified as receipts from personal services and are taxable at the rate of 1%.

Reg. 187. Undertakers.—The gross receipts from prof-sional charges will be taxable at the rate of 1%. Gross receipts of undertakers will not include money received as repayment of charges paid by the undertaker for client under the "funeral complete" plan.

Reg. 188. Wheat Allotment Contracts.—Amounts received from the United States Government under and pursuant to wheat allotment contracts or similar plans of contract must be included in gross receipts for taxation at the rate of 1%.

Reg. 188a. Receipts from U. S. Government on Account [fol. 240] of Crop and Live Stock Contracts.—Money received from the Federal government or its agencies as crop allotment payments, or similar plans or contract affecting the production of crops will be taxable under the Indiana Gross Income Tax Act.

Money received under contracts involving the non-raising of crops will be considered land rental. Rental money received from the Federal government is not exempted under Section 6-a or 6-c of the gross income tax Act which provides for the exemption of proceeds from sale to, or emoluments paid by, the United States government.

Money received from the Federal government or its agencies on account of live stock contracts are not considered as rentals, but are considered benefit payments as the sales price of live stock and would therefore be exempt under Section *of* 6-c of the Indiana Gross Income Tax Act. (Approved September 25, 1934.)

Article 43

Penalties

Reg. 189. Penalties will be imposed as provided by law for failure to follow the requirements of the gross income tax Act of 1933 or of the regulations issued thereunder.

(a) Interest. If tax is not paid when due, interest shall be added to all amounts due, at the rate of 1% per month from the date the tax was due.

(b) Deficiency in Tax. When there is a deficiency in payment of tax, interest at the rate of 1% per month shall be added from the date tax was due until paid.

(c) Negligence and Disregard of Rules. If the deficiency in tax payment is due to taxpayer's negligence or inten- [fol. 241] tional disregard of authorized rules and regulations with knowledge thereof, there shall be added (in addition to 1% interest per month) a penalty of 10% of the deficiency in tax, which interest and penalty shall become due and payable upon notice and demand by the department of treasury.

(d) Fraud with Intent to Evade. If the deficiency in tax payment is due to fraud with intent to evade the tax, there shall be added (in addition to 1% interest per month) 50% of the total amount of the deficiency in tax, which will become due and payable on notice and demand by the department of treasury.

(e) Failure and Refusal to File a Return. If a taxpayer fails or refuses to file a return as required by the Act, the department of treasury shall give written notice by registered mail to such taxpayer to make such return within 30 days from the date of such notice and if the taxpayer fails or refuses to file a return then a return will be made by the department of treasury from the best information available and such return shall be prima facie correct for the purposes of the Act, and if payment be not made within thirty days after demand therefor by the department of treasury, there shall be added fifty per cent of the deficiency in the tax as a penalty, together with interest at the rate of 1% per month on the tax from the time such tax was due. If such tax be paid within 30 days after notice by the department of treasury, then there shall be added 10%

as a penalty, and interest at the rate of 1% per month from the time such tax was due until paid.

(f) Warrant to Sheriff. If any tax imposed or any portion of such tax be not paid within 60 days after the same becomes due, the department of treasury shall issue a warrant under its official seal directed to the sheriff of any [fol. 242] county in the state commanding him to levy upon and sell the real and personal property of the person owing said tax, found within his county, for the payment of the amount thereof, with damages to the amount of 10% of the tax, in addition to the penalties imposed for failure to make a return, or for making a fraudulent return, and interest, and costs of executing the warrant, and to return such warrant to the department of treasury and pay to it the money collected by virtue thereof, by a time to be therein specified, not more than 60 days from the date of the warrant. * * * Such warrant when issued to the sheriff shall within five days after the receipt thereof be docketed by the clerk of the court in the judgment records and thereupon shall become a lien upon the title to and interest in the real and personal property of the tax-payer in the same manner as any judgment except that it will be a preferred lien. Levy by the sheriff upon any property of the taxpayer will be in all respects with like effect and in the manner prescribed by law, in respect to executions issued against property upon judgment of attachment proceedings of a court of record.

The taxpayer will not in any case be permitted to make settlement with the department of treasury after warrant has been issued but must pay all tax, penalties, interest and fees to the sheriff and the sheriff will then be required to make full and complete remittance to the department of treasury of the amount of tax, penalties, interest and damages demanded in the writ.

(g) Collection of Tax by Civil Action. A tax due and unpaid under this act shall constitute a debt due the state, and may be collected by action at law, or other appropriate judicial proceedings, which remedy shall be in addition to [fol. 243] all other existing remedies; and the same shall be collected, together with an additional 10% of the amount of the tax and penalties imposed for failure to make a return, or for making a fraudulent return, and the costs of collection if paid within 30 days after the date said tax

was due, and an additional 2% of the amount of the tax for each succeeding 30 days or fraction thereof elapsing before the tax shall have been paid; Provided, however, That the additional 2% penalty shall not be applied until a 10 day notice of delinquency shall have been sent to the taxpayer. (Law at sec. 13b.)

(h) Restraint and Injunction. Any person against whom a tax shall be assessed as herein provided shall be restrained and enjoined upon the order of the department of treasury, by proper proceedings instituted in the name of the State of Indiana brought by the attorney general and/or any prosecuting attorney at the request of the department of treasury, from engaging and/or continuing in business, until the taxes shall have been paid, and until such person shall have complied with the provisions of this act; and such attorneys shall prosecute violations of criminal provisions of this act, upon the request of the department of treasury. (Law at sec. 13c.)

(i) Criminal Offenses. It shall be unlawful for any person to fail or refuse to make the return provided to be made under the provisions of this Act, or to make any false or fraudulent return or false statement in any return, with intent to defraud the state or to evade the payment of the tax, or any part thereof, imposed by this Act; or for the president, vice-president, secretary, treasurer or other officer or employee of any company to make or permit to be made for any company or association any false return, [fol. 244] or any false statement in any return required by this Act, with the intent to evade the payment of any tax hereunder; or for any person to fail or refuse to permit the examination of any book, paper, account, record, or other data by the department of treasury, or its duly appointed agents, as required by this Act; or to fail or refuse to permit the inspection or appraisal of any property by the department of treasury or its duly appointed agents, or to refuse to offer testimony or produce any record as required in this Act. Any person, violating any of the provisions of this section shall be guilty of a misdemeanor, and on conviction thereof shall be fined not more than five hundred dollars, or imprisoned not exceeding six months in the county jail, of the county in which the action is instituted, or punished by both such fine and imprisonment, at the discretion of the court or jury trying the case, within

the limitations aforesaid. In addition to the foregoing penalties, any person who shall knowingly swear to or verify any false or fraudulent statement, with the intent aforesaid, shall be guilty of the offense of perjury and, on conviction thereof, shall be punished in the manner provided by law. Any company for which a false return, or a return containing a false statement as aforesaid, shall be made, shall be guilty of a misdemeanor, and may be punished by a fine of not more than five hundred dollars. (Law at sec. 23.)

Article 44

Temporary Regulations

Reg. 190. Deferment of Report of Gross Receipts Derived from Inter-State Sales.—Any taxpayer engaged in the business of manufacturing, wholesaling, jobbing or retailing, who has gross receipts derived from inter-state sales, will [fol. 245] not be required to include such receipts in any return already filed or to be filed prior to the time that the supreme court of the State of Indiana shall render a decision in a case now pending wherein the James D. Adams Manufacturing Company is plaintiff and the department of treasury of the State of Indiana is defendant.

However, every taxpayer engaged in the business of manufacturing, wholesaling, jobbing, or retailing and having gross receipts from inter-state sales will be required to keep a separate account of all such gross receipts and in the event it is the decision of the supreme court that the State of Indiana may assess and collect a tax on such receipts then every taxpayer having receipts from inter-state sales will be required to make amended returns for all periods for which returns have been made prior to such decision and to include therein all such gross receipts.

[fol. 246] If the income of any taxpayer has been derived entirely from such sources as herein set out and on account of such deferment not heretofore been liable for a return, he will be required to make returns for all periods and in addition to his other income included therein gross receipts derived from earnings and activities without the State of Indiana.

The mere fact that sales are made to a place or person without the state will not of itself be sufficient to bring such sales within inter-state commerce but such transactions

must have all the elements of inter-state commerce before the taxpayer can be permitted to defer the payment of tax upon such sales. All sales made at retail will be considered to have been made intra-state whether delivered to customers within or without the state.

Reg. 191. Deferment of Report of Gross Receipts from Income Derived from Earnings or Activities Carried on Entirely Outside the State of Indiana.

NOTE.—This Regulation is printed herein for back reference only. It was revoked by the Department Dec. 31, 1935, and superseded by Regulation 193 following.

Any taxpayer having gross receipts derived from earnings or activities carried on entirely without the State of Indiana will not be required to include such receipts in any return already filed or to be filed prior to the time that the supreme court of the State of Indiana shall render a decision affecting the right of the State of Indiana to impose a tax thereon.

However, no taxpayer within the state will be permitted to defer gross receipts simply for the reason that they are paid to him by persons or companies who are domiciled or [fol. 247] resident without the State of Indiana and the mere fact that any taxpayer receives money from without the state will not alone permit such taxpayer to defer the reporting of such income.

Every taxpayer having gross receipts derived from earnings and activities carried on entirely outside the state will be required to keep a separate account of such gross receipts and in the event it is the decision of the supreme court that the State of Indiana may assess and collect a tax upon such gross receipts, then every such taxpayer will be required to make amended returns for all periods for which returns have been made and to include therein such gross receipts as are derived from earnings and activities without the State of Indiana.

If the income of any taxpayer has been derived entirely from such sources as herein set out and on account of such deferment not heretofore been liable for a return, he will be required to make returns for all periods and in addition to his other income include therein gross receipts derived from earnings and activities without the State of Indiana.

This regulation has no bearing or relation to the deferring

of tax on receipts from inter-state commerce, as set out in Reg. 190.

Article 45

Appendix

Reg. 192. Whenever a taxpayer files a return accompanied by a certificate of a certified public accountant, registered as such by the State Board of Certified Accountants of Indiana, in which the certified public accountant certifies that he has examined the taxpayer's books and [fol. 248] prepared the return in accordance with the Gross Income Tax Act and the regulations issued thereunder, such return may be accepted by the Gross Income Tax Division without further audit of the taxpayer's books. In any case in which the taxpayer and the certified public accountant disagree with the Department's regulation as to the interpretation of the act with respect to any item or items appearing in the return and to that extent the return is not in accord with the regulations, full disclosure of all the facts as to such variation shall be made in the return and accompanying schedules and in the certificate of the certified public accountant. In such cases the return and certificate may be accepted by the Gross Income Tax Division as containing all of the facts upon which a determination of the tax liability can be made without further audit of the taxpayer's books.

Any intentional misstatement of omission of a material fact in a gross income tax return certified to by a certified public accountant shall be made the basis of a proceeding under Section 3, Chapter 175, Acts of 1921, and amendments thereto for the revocation of the certificate of said certified public accountant.

Nothing in this regulation shall be construed as a waiver or limitation of the Department's right to examine the books and records of a taxpayer in any case in which the Department determines that such examination is necessary. (Approved November 30, 1934.)

Reg. 193. Ruling Revoking Regulation 191 and Specifying Taxable and Non-Taxable Income Received by Persons Resident and/or Domiciled in Indiana from Sources in Other States.—Regulation 191 issued by the Department of Treasury respecting income derived by residents of Indi-

[fol. 249] ana from earnings, or from activities, carried on entirely outside the State of Indiana, is hereby revoked and the deferment privilege granted thereunder is hereby cancelled. Hereafter all income from activities from sources entirely outside the State of Indiana will be designated as "taxable" or "non-taxable"—the words "deferrable" and "non-deferrable" being no longer applicable to such income.

All persons as defined in the Gross Income Tax Act who are resident and/or domiciled in Indiana will be required to report for taxation their gross income received on and after May 1, 1933, from all sources, including that derived from out of state sources and activities except where such gross income is derived from a business regularly carried on, the situs of which is outside the state; from real property situated outside the state; or from intangibles having a business situs outside of Indiana and such intangibles are not held within the State of Indiana. The mere fact that income is received from a point located out of the State will not of itself affect the taxability of such income.

For the purpose of fixing the taxable status of specific kinds of income, the following rulings are made as a part of this regulation with respect to the classifications set out.

1. Wages, Commissions, Salaries, Fees, and all Other Personal Remuneration.—Persons resident and/or domiciled in Indiana will be required to report for taxation their entire income of this class received as remuneration for personal services, regardless of the fact that their employer is located outside the State or that a part of or all of their [fol. 250] employment is in states other than Indiana, or that they are paid from a place the location of which is in states other than Indiana.

2. Rentals of Real Estate Located Outside of Indiana.—Persons resident and/or domiciled in Indiana owning real estate situated in states other than Indiana will not be required to pay tax upon rentals derived from such property.

3. Rental of Personal Property.—Persons resident and/or domiciled in Indiana receiving income derived from rentals of personal property located in other states will be taxable thereon unless such personal property is a part

of a business regularly engaged in with its legal situs in such other states.

4. Receipts from Businesses Maintained and Operated Wholly Outside the State.—Persons resident and/or domiciled in Indiana who are engaged in business, the legal situs and location of which is in states other than Indiana, and the activities of such business are carried on in states other than Indiana, will not be required to pay tax upon the gross receipts therefrom. For the purpose of this ruling the operation of a farm will be included under the term "engaged in business."

5. Interest, Dividends and Royalties.—Persons resident and/or domiciled in Indiana will be required to report and pay tax upon the receipts of royalties from patents or copyrights, dividends from stocks, and interest derived from warrants, bonds taxable in Indiana, notes and other interest bearing securities having as their legal situs the domicile of the owner. The mere depositing or placing of securities at a place outside of Indiana will not be sufficient to fix their legal situs at a place other than the domicile of the owner.

[fol. 251] 6. Sale of Real Estate Located Outside of Indiana.—Persons, resident and/or domiciled in Indiana will not be required to report and pay tax upon any of the proceeds from the sale of real estate owned by them and situated in states other than the State of Indiana.

7. Sales of Intangible Assets.—Persons resident and/or domiciled in Indiana will be required to report for taxation all proceeds from the sale of intangible property where the legal situs of such property is in Indiana, even though sale is made outside the state. This will include proceeds from the sale and/or surrender of capital stock to a corporation in dissolution. This will also include all receipts of persons resident and/or domiciled in Indiana derived from outright sales of securities or from marginal stock transactions negotiated through brokers situated outside the state. The legal situs of all intangibles is presumed to be the domicile of the owner. (Provided, however, whenever such intangible property has a legal business situs as set out in No. 4 herein, the proceeds from the sale of such property will not be reported for taxation.)

8. Sale of Tangible Personal Property.—Persons resident and/or domiciled in Indiana receiving proceeds from the sale of personal property in states other than Indiana will be taxable thereon unless it can be shown that such personal property is an integral part of a business regularly engaged in by such person and which has its legal situs outside of Indiana.

9. Alimony.—Persons resident and/or domiciled in Indiana will be taxable upon the receipt of alimony paid to them by persons resident of this state or by persons domiciled in other states, whether such alimony be awarded by Indiana courts or courts located in states other than Indiana.

[fol. 252] 10. Insurance.—Persons resident and/or domiciled in Indiana will be taxable upon money received from out of state insurance companies on policies of every kind or character except as provided in Article No. 13 of the Department's Regulations, and Section 6-d and 6-e of the Act. Insurance companies domiciled in Indiana will be taxable on all premium income (subject to the limitations set out in Section 1 (h) of the Act), regardless of the fact that a part of such premiums are from policies sold outside of Indiana.

11. Performance of Contracts.—Persons resident and/or domiciled in Indiana will not be required to report and pay tax upon gross income from contracts where such contracts are entered into and performed entirely outside of Indiana.

Constructive Receipts

Whenever any of the taxable receipts as classified above are constructively received as defined in Regulation 130, they will be considered as taxable or non-taxable, consistent with the rulings as made herein on each classification as though such receipts actually came into the taxpayer's possession. Amounts received by judgment for any of the gross receipts above classified will have a taxable status consistent with the rulings pertinent thereto and with Regulation No. 180.

This Regulation shall be as in force and effect from May 1, 1933, and all taxable gross income as designated in the foregoing, received on or after such date, the report and taxation of which has been deferred under Regulation 191, must be reported and tax paid thereon on or before January

30, 1936, by filing amended annual returns for 1933 and 1934. Deferred income received during quarterly periods [fol. 253] of 1935 must be reported on the regular 1935 annual return. No interest or penalty will be imposed when report and payment is made as herein provided. If report and payment is not made by the date designated herein, interest will be added at the rate of 1% per month from the regular dates tax was due upon such income. This Regulation in no way affects the status of receipts from transactions in interstate commerce and the deferment privilege granted by Regulation 190 with reference to such receipts will remain in force until such Regulation is rescinded by the Department. (Approved December 31, 1935.)

July 31, 1934.

The foregoing regulations are hereby made and promulgated and supersede any and all former regulations issued by The Department of Treasury, and are effective on and after this date.

C. A. Jackson, Director, Gross Income Tax Division of the Department of Treasury of Indiana.

Approved July 31, 1934. William Storen, Chief Administrative Officer of The Department of Treasury of Indiana.

The Department of Treasury: Paul V. McNutt, Governor. William Storen, Treasurer of State. Floyd E. Williamson, Auditor of State.

Revised May 23, 1936. C. A. Jackson, Director, Gross Income Tax Division of the Department of Treasury of Indiana.

[fol. 254] Revision Approved May 23, 1936. Peter F. Hein, Chief Administrative Officer of The Department of Treasury of Indiana.

The Department of Treasury: Paul V. McNutt, Governor. Peter F. Hein, Treasurer of State. Laurence F. Sullivan, Auditor of State.

[fol. 255] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 256] IN SUPREME COURT OF THE UNITED STATES

APPELLANT'S STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION OF PARTS OF THE RECORD TO BE PRINTED—Filed December 20, 1937

Comes now the appellant and adopts its assignment of errors in the appeal herein as its statement of the points to be relied upon, and represents that the whole of the record as filed is necessary for consideration of this case.

Dated this 29th day of November, 1937.

Frederick E. Matson, Harry T. Ice, Attorneys for Appellant. Matson, Ross, McCord & Clifford, Of Counsel.

Due and timely service of the appellant's service of points to be relied upon and designation of parts of the record to be printed is acknowledged this 29th day of November, 1937.

Omer Stokes Jackson, Attorney General of Indiana; Joseph W. Hutchinson, Deputy Atty. General of Indiana; Joseph L. McNamara, Deputy Atty. General of Indiana, Attorneys for Appellees.

[fol. 257] [File endorsement omitted.]

Endorsed on cover: File No. 42,122. Indiana Supreme Court. Term No. 641. J. D. Adams Manufacturing Company, appellant, vs. William Storen, as Chief Administrative Officer of the Department of Treasury of the State of Indiana. Filed December 17, 1937. Term No. 641, O. T., 1937.

FILE COPY

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1937

No. 641

J. D. ADAMS MANUFACTURING COMPANY,
Appellant,

vs.

WILLIAM STOREN, AS CHIEF ADMINISTRATIVE OFFICER OF THE DEPARTMENT OF TREASURY OF THE STATE OF INDIANA, ET AL.,
Appellees.

APPEAL FROM THE SUPREME COURT OF THE STATE OF INDIANA.

STATEMENT AS TO JURISDICTION.

FREDERICK E. MATSON,
HARRY T. ICE,
Counsel for Appellant.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1937

No. 641

J. D. ADAMS MANUFACTURING COMPANY,
Appellant,

vs.

WILLIAM STOREN, AS CHIEF ADMINISTRATIVE OFFICER OF THE DEPARTMENT OF TREASURY OF THE STATE OF INDIANA; DEPARTMENT OF TREASURY OF THE STATE OF INDIANA; PAUL V. McNUTT, WILLIAM STOREN, FLOYD E. WILLIAMSON; AS AND CONSTITUTING THE BOARD OF DEPARTMENT OF TREASURY OF THE STATE OF INDIANA; PHILIP LUTZ, JR., AS ATTORNEY GENERAL OF THE STATE OF INDIANA,
Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF INDIANA.

STATEMENT AS TO JURISDICTION.

Pursuant to Rule 12(1) of the rules of this Court, appellant[1] submits this statement showing that this Court has jurisdiction upon appeal to review the judgment in question.

[1] NOTE.—J. D. Adams Mfg. Co. was plaintiff in the trial court, appellee in the State Supreme Court, and appellant in this Court. William Storen *et al.* were defendants in the trial court, appellants in the State Supreme Court, and appellees in this Court.

In this *statement* (except quotations), "appellant" always refers to J. D. Adams Mfg. Co.; "appellees" always refers to William Storen *et al.*

I.

Form of Action.

Appellant brought this suit against appellees, as taxing officers of the State of Indiana, to obtain a judicial declaration as to the right of the State to impose a tax upon gross receipts of appellant derived from certain sources. The action is under the Uniform Declaratory Judgments Act which provides that "such declaration shall have the force and effect of a final judgment or decree." Indiana Acts 1927, Ch. 81, Sec. 1, page 208; Ind. Stat. Ann. (Burns) 1933, Sec. 3-1101.

The declaratory form of action has been accepted by the Supreme Court of Indiana and the Supreme Court of the United States as a proper method for determining questions of this character.

Zoercher v. *Agler,* 202 Ind. 214;

Nashville, etc., R. Co. v. *Wallace,* 288 U. S. 249.

It was shown both in the stipulation of facts and the findings by the trial court that an actual controversy exists between the parties to the action (R. 32, 69).

The suit was brought by appellant in its own behalf and in behalf of all others similarly situated. Indiana Acts 1881 (Spec. Sess.), Ch. 38, Sec. 21; Ind. Stat. Ann. (Burns) 1933, Sec. 2-220.

The Act under which the gross receipts tax is sought to be imposed is Chapter 50, Indiana Acts 1933, and is known as the "Gross Income Tax Act of 1933".

II.

The Opinion Below.

The opinion of the Supreme Court of Indiana, rendered by Fansler, J., is set out in full as Appendix A. The opinion

of Treanor, J., dissenting in part and concurring in part, is also set out in full in Appendix A. The opinions in the case are not yet officially reported, but are to be found in 7 N. E. (2d) 941; also R. 85.

III.

Statute Sustaining Jurisdiction.

The statutory provision believed to sustain jurisdiction of the Supreme Court of the United States is Section 237(a) of the Judicial Code, as amended, reading, to the extent relevant here, as follows:

> "(a) A final judgment or decree in any suit in the highest court of a state in which a decision in the suit could be had, * * * where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the constitution * * * of the United States, and the decision is in favor of its validity, may be reviewed by the Supreme Court upon a writ of error. * * *" (Act of Cong. Feb. 13, 1925, c. 229, Sec. 1, 43 Stat. 937, 28 U. S. C. Sec. 344(a).)

The remedy by writ of error under the foregoing Section has been abolished and appeal substituted. (Act of Jan. 31, 1928, c. 14, Secs. 1 and 2, 45 Stat. 54, as amended April 26, 1928, c. 440, 45 Stat. 466; Title 28 U. S. C. Sec. 344(a), Sec. 861 (a) and Sec. 861(b).)

IV.

Highest State Court is the Supreme Court.

Under the Constitution of Indiana, the jurisdictional power of the State is vested in a Supreme Court, and it is the court of last resort within the State in which a decision could be had. There is no other or higher court in

Indiana to which the questions stated in the assignment of errors could be presented, or by which they could be decided.

Constitution of Indiana, Article 7, Sec. 1;

Ex Parte France, 176 Ind. 72, 80-81;

Curless v. *Watson,* 180 Ind. 86, 92, 93.

V.

Finality of the Judgment.

Under the established practice of Indiana, the judgment of the Supreme Court in an appealed case consists of the order made at the close of the deciding opinion. The clerk makes a minute of the decision and order, which is signed by the Chief Justice, and no separate or other judgment is entered. The judgment so made when the case is decided stands for sixty days and then becomes final, unless a petition for rehearing has been filed. If a petition for rehearing is filed, the judgment of the Court becomes final when the rehearing is denied. The controlling provisions of Constitution and statute are:

> "The Supreme Court shall, upon the decision of every case, give a statement in writing of each question arising in the record of such case, and the decision of the Court thereon." Constitution of Indiana, Article 7, Sec. 5.
>
> "When any cause is determined in the Supreme Court, the Clerk shall forthwith notify the clerk of the court below that it is determined, and whether reversed or affirmed, in whole or in part, or dismissed. At any time within sixty (60) days after such determination, either party may file a petition for a rehearing; if not so filed the decision and instructions of the Supreme Court shall be certified to the court below, unless otherwise ordered by the court." Indiana Acts 1881 (Spec. Sess.), ch. 38, Sec. 650, p. 240; Ind. Stat. Ann. (Burns) 1933, Sec. 2-3236.

In this case the deciding order, which became the final judgment when rehearing was denied, found at the end of the Supreme Court's opinion (R. 109), reads:

> "Judgment reversed, with instructions to enter judgment for appellants, as indicated by this opinion." 7 N. E. (2d) 941, 951.

The decision in this case was rendered on April 30, 1937. Petition for rehearing was filed on June 28th, 1937. Rehearing was denied on September 20, 1937 (R. 126).

This is the final judgment from which the appeal is properly taken, and from date of which, September 20, 1937, the time for making the application began to run. This is in accordance with a decision of this Court on an appeal from Indiana.

> *Citizens Bank of Michigan City, Ind.*, v. *Opperman*, 249 U. S. 448, 449.

The judgment is final in that it completely determines the controversy, leaving nothing to be done except the ministerial act of enforcement. The judgment denies relief to appellant and orders a reversal of the judgment of the trial court and an entry of judgment for appellees in accordance with the opinion. The judgment appealed from is final within the meaning of the Judicial Code, Sec. 237(a), as amended Feb. 13, 1925.

VI.

Timely Application for Appeal.

Rehearing was denied September 20, 1937. The petition for appeal, accompanied by assignments of error, prayer for reversal, and this statement as to jurisdiction, as required by Rule 12(1) of this Court, was on the 29th day of November, 1937, presented to the Hon. Walter E. Treanor, Chief Justice of the Supreme Court of Indiana, and

by him allowed on the 29th day of November, 1937 (R. 132). Thus, the application for appeal was made within three months after the entry of final judgment, as provided in the Act of Feb. 13, 1925, c. 229, Sec. 8(a), 43 Stat. 940, 28 U. S. C., Sec. 350.

VII.

State Statute Involved.

The statute of the State, the validity of which is drawn in question, is Ch. 50, Indiana Acts 1933, p. 388, known as "Gross Income Tax Act of 1933". The pertinent provisions of the Act are set forth below.

Section 2 describes the general scope of the Act:

> "There is hereby imposed a tax, measured by the amount or volume of gross income, and in the amount to be determined by the application of rates on such gross income as hereinafter provided. Such tax shall be levied upon the entire gross income of all residents of the State of Indiana, and upon the gross income derived from sources within the State of Indiana, of all persons and/or companies, including banks, who are not residents of the State of Indiana, but are engaged in business in this State, or who derive gross income from sources within this state, * * *." Sec. 2, Ch. 50, Indiana Acts 1933, p. 390; Ind. Stat. Ann. (Burns) 1933, Sec. 64-2602.

Section 1 consists of definitions, including that of the term "gross income":

> "*The term 'gross income,'* except as hereinafter otherwise expressly provided, *means the gross receipts of the taxpayer* received as compensation for personal services, and the gross receipts of the taxpayer *derived from trades, businesses or commerce,* and the gross receipts proceeding or accruing from the sale of property, tangible or intangible, real or personal, or service, or any or all of the foregoing, and *all receipts by*

reason of the investment of capital, including interest, discount, rentals, royalties, fees, commissions or other emoluments, however designated, and without any deductions on account of the costs of property sold, the cost of materials used, labor cost, interest or discount paid, or any other expense whatsoever, and without any deductions on account of losses; Provided. * * *" (Minor exceptions of items which are not true receipts.) Sec. 1(f), Ch. 50, Indiana Acts 1933, p. 389; Ind. Stat. Ann. (Burns) 1933, Sec. 64-2601. See *Miles* v. Department of Treasury, 209 Ind. 172, 195. (Our italics.)

Section 3 contains the specific imposition of the tax upon different types of gross receipts and states the rates applicable thereto. Clauses 3(a), which covers the receipts of appellant derived from commerce, and 3(f), which covers its receipts from interest on municipal bonds, are typical of the wording used in the entire Section:

"Sec. 3. The tax hereby provided for shall be imposed at the following rates:

(a) Upon the entire gross income of every person engaged in the business of manufacturing, compounding, or preparing for sale, profit, or use, any article or articles, substance or substances, commodity or commodities; * * * one-fourth of one per cent. * * *

(f) Upon the gross income of every person engaged in any business or activity not enumerated in sub-sections (a) to (e) inclusive, of this Section, including, * * * all funds from investment of capital, and all receipts from any source whatsoever, one per cent." Sec. 3(a) (f), Ch. 50, Indiana Acts 1933, p. 391; Ind. Stat. Ann. (Burns) 1933, Sec. 64-2603. See decision in instant case Appendix A; R. 92; 7 N. E. (2d) 941, 942-943.

The tax has been held to apply to the gross receipts of a manufacturer from sales to the ultimate user of an article at the rate of one per cent (7 N. E. (2d) 941).

Section 5 provides for a deduction of $1,000.00 annually from the gross income of each taxpayer. Sec. 5, Ch. 50, Indiana Acts 1933, p. 392; Ind. Stat. Ann. (Burns) 1933, Sec. 64-2605.

Sections 6 and 7 set out various exceptions from the provisions of the Act, including:

> "SEC. 6. There shall be excepted from the gross income taxable under this act:
>
> (a) So much of such gross income as is derived from business conducted in commerce between this state and other states of the United States, or between this state and foreign countries, to the extent to which the State of Indiana is prohibited from taxing under the Constitution of the United States of America. * * *"
> Sec. 6(a), Ch. 50, Indiana Acts 1933, pp. 392-393; Ind. Stat. Ann. (Burns) 1933, Sec. 64-2606 and Sec. 64-2607.

The Act contains the usual provisions for collection, penalties for delinquency, the right to command the sheriff to levy upon the property of the taxpayer, and to enjoin the delinquent taxpayer from continuing in business. Sec. 13, Ch. 50, Indiana Acts 1933, pp. 399-401; Ind. Stat. Ann. (Burns) 1933, Sec. 64-2613.

The Act was construed in this case by the Supreme Court of Indiana to include as taxable (a) the gross receipts of appellant derived from sales of its products upon orders from customers in other States and foreign countries, where delivery is made from appellant's Indiana plant to such customers in other states and foreign countries (Appendix A, pp. 27, 41, R. 91, 109, 7 N. E. (2d) 941, 944, 950); and (b) the gross receipts of appellant from interest on tax-exempt bonds of municipal corporations of Indiana issued prior to May 1, 1933 (effective date of the Gross Income Tax Act of 1933), which bonds had been heretofore issued under prior statutes having the force of contracts providing that such

bonds shall be exempt from taxation (Appendix A, p. 27 R. 90, 7 N. E. (2d) 941, 943-944).

The Gross Income Tax Act of 1933 was challenged by appellant in both courts below in two respects, as being repugnant to the Federal Constitution. *First.* It is in conflict with Article I, Section 8 and Section 10 of the Constitution of the United States, as applied to appellant's gross receipts derived from commerce among the several States of the United States and with foreign countries, as constituting an illegal burden on said commerce, and as an impost or duty on exports without the consent of Congress. *Second.* It is in violation of Article I, Section 10 of the Constitution of the United States as impairing the obligation of contract, as applied to the interest income derived from tax-exempt bonds of municipalities of the State of Indiana.

VIII.

Nature of the Case.

The appellant, J. D. Adams Mfg. Co., filed on June 3, 1933, in the Superior Court of Marion County, Indiana, its complaint for a declaratory judgment touching its duty, and the duty of others similarly situated, to pay a tax upon certain portions of its gross receipts under the Gross Income Tax Act of 1933 (R. 5). The suit was filed after receipts asserted to be taxable were received by appellant but before the date the first return was due, July 15, 1933.

The defendants, appellees on this appeal, are administrative officers and bodies of the State of Indiana charged with the enforcement of the Act. They appeared by counsel and on June 17, 1933, filed answer in general denial to the complaint. On June 26, 1933, the cause was submitted on a stipulation of facts and argued. On June 28, 1933, the trial court entered judgment declaring that appellees have no right, authority or power to impose or collect any tax upon gross

receipts of appellant, or others similarly situated, derived from business conducted in commerce between this State and other States or between this State and foreign countries, and further declaring that appellees have no power to impose or collect any tax upon that part of the gross receipts of appellant and others similarly situated derived from interest received on bonds, notes or other evidences of indebtedness issued prior to May 1, 1933 by municipal corporations of the State of Indiana, which by statute were at the time of their issuance declared exempt from taxation (R. 38-39).

It appears from the stipulation of facts and the finding by the trial court that appellant is an Indiana corporation engaged in manufacturing machinery and equipment for the construction and repair of roads and highways; that its home office and principal place of business, and its only manufacturing plant, is located at Indianapolis, Indiana; that it sells approximately eighty per cent (80%) of its products to customers in States other than Indiana and in foreign countries; that all sales made to customers located outside of the State of Indiana are upon orders taken subject to approval of the home office, shipments being made from the factory and payments made to the home office; that receipts from business in other States and foreign countries during each of the four years immediately preceding the trial were in excess of One Million Dollars; that certain specific sales had been made subsequent to the effective date of the Gross Income Tax Act of 1933 and before the date of filing the complaint (i. e., between May 1, 1933, and June 3, 1933) to customers in other States and in foreign countries, and that cash in specified amounts had been received in payment therefor; that it was estimated that the gross receipts of the Company from sales of its products made in interstate and foreign commerce will continue to be a substantial proportion of its entire gross income each year (R. 58).

It also appears from the stipulation of facts and the findings of the Court that the Company had acquired prior to February 27, 1933 (date of enactment of the Act), and had in its possession on May 1, 1933 (effective date of the Act), securities of municipal corporations of the State of Indiana in excess of Two Hundred Thousand Dollars face value; that such obligations at the time of their issuance were declared to be exempt from taxation by the provisions of Sec. 5, Cl. Twentieth, Ch. 59, Indiana Acts 1919, p. 198, which reads:

> "Twentieth. All bonds, notes and other evidences of indebtedness hereafter issued by the State of Indiana or by municipal corporations within the State upon which the said State or the said municipal corporations pay interest shall be exempt from taxation." (The Section has been amended but not Clause Twentieth. See Indiana Acts 1923, Ch. 191, Sec. 1 (Twentieth); Ind. Stat. Ann. (Burns) Sec. 64-201, Cl. Twentieth.)

that subsequent to May 1, 1933, and before filing the complaint, appellant had collected and received as interest earned on such tax-exempt obligations in excess of Two Thousand Five Hundred Dollars (R. 59).

It also appears from the stipulations and findings of fact that appellees were asserting the right and had declared their determination to collect the tax from appellant upon its gross receipts derived from sales in interstate and foreign commerce, and upon its gross receipts derived from interest on tax-exempt bonds of municipal corporations of the State of Indiana, and that an actual controversy existed between the parties (R. 67-69).

IX.

Origin of Federal Questions and Rulings of Courts Below.

(a) Trial Court—Complaint Raised the Federal Questions.

The appellant in its complaint filed in the trial court alleged (par. 9) that:

> "Section 6(a) of said gross income tax act of 1933 provides that so much of a taxpayer's gross income as is derived from business conducted in commerce between the State of Indiana and other states of the United States or between the State of Indiana and foreign countries, shall be excepted from taxation to the extent to which the State of Indiana is prohibited from taxing the same under the Constitution of the United States. Defendants and each of them are asserting that the Constitution of the United States does not in any way prohibit the levying of a tax upon gross income derived from business conducted in commerce between the State of Indiana and other states of the United States or between the State of Indiana and foreign countries, and that plaintiff is required to file a return, and is liable to pay a tax at the rate prescribed in said act, upon the entire gross income of plaintiff, including that derived from interstate and foreign commerce. * * *
>
> "Plaintiff says that under the Constitution of the United States, the State of Indiana is prohibited from levying a tax upon the gross income derived from plaintiff's commerce between the State of Indiana and other states of the United States, and from levying a tax upon gross income derived from plaintiff's commerce between the State of Indiana and foreign countries, and, without the consent of Congress, from laying any duties on articles exported by plaintiff to foreign countries, * * * and that the true intent of the General Assembly of Indiana in enacting said gross income tax act, and especially Section 6(a) thereof, was to exempt from taxation as a part of the gross income of any taxpayer, the gross income derived from interstate and foreign commerce.

"Plaintiff further says that if said act, when construed according to its true intent, imposes a tax on the gross income of plaintiff derived from its business conducted as set forth * * * then said act is invalid and void for the reason that such tax constitutes a regulation of and a burden upon interstate and foreign commerce, and a duty upon exports without the consent of Congress, and is in violation of Section 8 and Section 10 of Article I of the Constitution of the United States" (R. 14-16).

The complaint also alleged (par. 11) that said Gross Income Tax Act of 1933

"is invalid and void to the extent that a tax is levied upon (a) that part of the gross income of plaintiff which is derived from interest upon the tax exempt bonds, notes and other evidences of indebtedness of municipal corporations within the State of Indiana and each of them described in * * * this complaint * * * for the reason that the tax upon such gross income impairs the obligation of contracts existing between plaintiff and each of the municipalities, or political subdivisions which issued the obligations, and in such respect said Act is in conflict with Section 10 of Article I of the Constitution of the United States * * *" (R. 17-18).

The prayer of the complaint, so far as pertinent here, was:

"WHEREFORE plaintiff prays:

* * * * * * *

"2. That this Court determine, adjudge and decree that said gross income tax act of 1933 does not require the levy and collection of a tax upon gross income derived from interstate or foreign commerce as conducted by the plaintiff; or if such act be construed to require the levy and collection of such tax, then that the Court determine, adjudge and decree that said act is unconstitutional and void insofar as it applies to gross income derived from business conducted by the plaintiff in interstate and foreign commerce.

* * * * * * *

"4. That this Court determine, adjudge and decree that said gross income tax act is unconstitutional and void in so far as it requires the plaintiff to pay a tax upon that part of its gross income derived from interest * * * on securities which are by prior statutes declared to be exempt from taxation * * *" (R. 21-22).

(*b*) *Trial Court—Judgment Passed on Federal Questions.*

A general denial was filed to the complaint by appellees, and after trial, a finding and judgment was entered by the Court; and the judgment of the trial court, so far as pertinent here, was:

"1. It is Declared, Ordered, Adjudged and Decreed that said Gross Income Tax Act of 1933 does not authorize or require the levy and collection of a tax upon gross income derived by the plaintiff, or others similarly situated, from business conducted in commerce between this state and other states of the United States or between this state and foreign countries, and that the defendants have no right, authority or power to impose, assess or collect any tax upon gross income derived by the plaintiff, or others similarly situated from business conducted in commerce between this state and other states of the United States or between this state and foreign countries, and that defendants have no right, authority or power to impose, assess or collect any tax on gross income derived by the plaintiff, or others similarly situated, from sales made as stated above in paragraph (a) of this finding and decree.

* * * * * * *

"3. It is Further Declared, Ordered, Adjudged and Decreed that said Gross Income Tax Act of 1933 is unconstitutional and void insofar as it requires the plaintiff, or others similarly situated, to pay a tax upon that part of its gross income derived either from interest received on, * * * bonds, notes or other evidences of indebtedness issued prior to May 1, 1933, by municipal corporations of the State of Indiana, and which are declared by the statutes of Indiana to be ex-

empt from taxation; and that the defendants have no right, authority or power to impose, assess or collect any tax upon gross income derived by the plaintiff, or others similarly situated, from any such securities" (R. 37-39).

A motion for a new trial was filed by appellees on the ground that the decision of the Court was not sustained by sufficient evidence and was contrary to law, and was overruled (R. 44).

(c) *State Supreme Court—Federal Questions Properly Presented.*

An appeal was taken by defendants, appellees here, to the Supreme Court of Indiana, and the error assigned on the appeal was the overruling of the motion for a new trial (R. 74). Under the practice in Indiana, the specific legal points relied upon are presented in the appellant's brief under its "Propositions, Points and Authorities." Appellees' brief, under this heading, presented as "Proposition II" the following:

> "The Court erred in overruling the motion for a new trial for the reason that the imposition of the gross income tax upon interest derived from bonds of Indiana governmental units is not an impairment of contract and that said act is not in conflict of Section 10 of Article I of the Constitution of the United States of America * * *" (R. 77).

Appellees also presented as Proposition III in their brief, the following:

> "The tax imposed by Chapter 50 of the Acts of 1933 is not an intent by the State of Indiana to regulate commerce among the several states and with foreign nations and is not repugnant to the provisions of Article 1, Section 8, of the Constitution of the United States" (R. 80).

(d) *Highest State Court Decision in Favor of Validity of Statute.*

The Supreme Court of Indiana treated the Federal questions as properly raised and passed upon them. The Supreme Court ordered the judgment of the lower court reversed with instructions to enter judgment for appellees. The majority of the Court in its opinion stated that:

> "* * * the act must be construed as contemplating a tax on all income that the state is permitted to tax. Courts will not prevent the carrying out of a legislative intention unless a Constitution clearly forbids. The act must be construed as levying the tax unless such a levy is violative of article 1, section 8, of the Federal Constitution." Appendix A, p. 27; R. 91; 7 N. E. (2d) 944.

And concluded, after a review of a number of decisions touching the commerce clause of the Constitution, that:

> "The Court (Superior Court of Marion County) erred in holding that the law does not authorize or require the assessment of a tax upon the gross income of appellee and others similarly situated, derived from business conducted in interstate and foreign commerce." Appendix A, p. 41; R. 109; 7 N. E. (2d) 951.

The Court also stated that the bonds from which appellant's income is received are specifically exempt from taxation, but that there is no statutory provision which exempts the interest thereon from excise taxes which may be imposed by the State, and that the tax does not impair the obligation of a contract within the meaning of the Constitution of the United States (7 N. E. (2d) 943-944).

Judge Treanor concurred in the opinion that

> "The imposition of a gross income tax on interest derived from tax exempt bonds of municipal corporations does not impair the obligation of contract." Appendix A, p. 42; R. 111; 7 N. E. (2d) 951.

but dissented from the majority of the Court on the other Federal question, saying:

> "* * * I dissent from the holding, and the reasoning supporting it, that a tax imposed upon gross income of appellee derived from interstate and foreign commerce is not repugnant to the commerce provision of article 1, section 8, of the Constitution of the United States under the law as announced by the Supreme Court of the United States." Appendix A, p. 42; R. 111-112; 7 N. E. (2d) 941, 951.

The majority of the Supreme Court of Indiana in its opinion, among other cases cites and purports to rely upon the following cases to demonstrate that the tax is not repugnant to the commerce clause of the Constitution of the United States:

Galveston, etc., R. Co. v. *State of Texas*, 210 U. S. 217;
Cudahy Packing Co. v. *State of Minnesota*, 246 U. S. 450;
Peck & Co. v. *Lowe*, 247 U. S. 165;
United States Glue Co. v. *Town of Oak Creek*, 247 U. S. 321;
Postal Telegraph Cable Co. v. *City of Richmond*, 249 U. S. 252;
American Manufacturing Co. v. *City of St. Louis*, 250 U. S. 459;
Shaffer v. *Carter*, 252 U. S. 37;
Matson Nav. Co. et al. v. *State Board et al.*, 297 U. S. 441.

The dissenting Judge, in his opinion, cites and relies upon the following cases as demonstrating that the tax in question is repugnant to the commerce clause of the Constitution of the United States:

Crew Levick Co. v. *Pennsylvania*, 245 U. S. 292;
Peck & Co. v. *Lowe*, 247 U. S. 165;
United States Glue Co. v. *Oak Creek*, 247 U. S. 321.

Thus the Federal questions were presented at the earliest opportunity in the trial court, were presented to, entertained by and decided by the Supreme Court—the highest court in the State in which a decision in the suit could be had, and that decision was in favor of the validity of the State statute.

X.

Federal Questions Necessarily Decided.

Appellant in both State courts claimed exemption from the tax on certain types of gross receipts on the sole ground that the exaction of the tax on such gross receipts was in violation of specified provisions of the Federal Constitution.

By judgment of the trial court, appellant was exempted from the tax on the disputed types of gross receipts. By the judgment of the State Supreme Court, appellant is compelled to pay the tax on such gross receipts.

It is evident, therefore, that it appears affirmatively from the record that the Federal questions were presented for decision to the highest court of the State having jurisdiction, that its decision of the Federal questions was necessary to the determination of the cause, that the questions were actually decided, and that the judgment as rendered could not have been given without deciding them.

Lynch v. *New York ex rel.*, 293 U. S. 52, 54.

XI.

Federal Questions Are Substantial.

The substantial character of appellant's contention that the tax imposed by the Act on its gross receipts from interstate and foreign commerce constitutes an illegal burden thereon in violation of the commerce clause of the Federal Constitution is evidenced by the fact that no effort has been made by the Department of Treasury of the State of

Indiana to impose or collect such tax from any taxpayers in Indiana since the law became effective May 1, 1933.

It was recognized from the first by taxpayers and by the Department of Treasury and the Attorney General of the State, that this question was serious and important. In order to avoid the burden of accounting and possible refunds to innumerable taxpayers, and in consideration also of the convenience and rights of taxpayers, the Department of Treasury, before the first tax return under the law was due (July 15, 1933), decided to postpone any endeavor to collect the tax on gross receipts from interstate and foreign commerce until this question should be decided by final judicial authority. To that end, the Department promptly issued a temporary regulation, which later, after the instant suit was filed, was elaborated and promulgated as "Temporary Regulation 190." This Regulation provided that taxpayers be permitted to defer the payment of gross income tax upon gross receipts derived from interstate commerce, and that all such receipts should be segregated upon the taxpayer's books, pending a decision of the Indiana Supreme Court in the case of *J. D. Adams Mfg. Co. v. Department of Treasury* (the instant case).

Following the decision of the Indiana Supreme Court in the instant case, the Department of Treasury in promulgating new regulations on the Gross Income Tax Act of 1933 as amended in 1937, effective July 1, 1937, included Temporary Regulation 3801. This Regulation, after reciting the situation to date and referring to the Supreme Court decision on April 30, 1937, and the fact that "plaintiff in the Adams case contemplates appealing such decision to the United States Supreme Court", modified Temporary Regulation 190 to provide among other things:

> "Therefore, pending an appeal to, and a final decision of, the United States Supreme Court in the case of J. D. Adams Mfg. Co. *v.* Department of Treasury of

Indiana, any taxpayer under the Gross Income Tax Act may defer the payment of gross income tax upon such part of his gross receipts as is derived from transactions in interstate commerce." See Appendix B.

Appellant derives approximately eighty per cent of its gross receipts from interstate and foreign commerce. The imposition of the tax upon these gross receipts at the rate of one per cent and one-fourth of one per cent (the higher rate applying if a sale is to an ultimate user, and the lower rate if to a person who resells), as to appellant alone involves a substantial tax liability each year. The case is also prosecuted on behalf of all other taxpayers similarly situated.

The imposition of this tax upon the gross receipts of appellant and others similarly situated derived from interstate and foreign commerce is a clear invasion of a substantial right of appellant and other taxpayers under Sections 8 and 10 of Article I of the Constitution of the United States. It has always been held by this Court that a tax upon "gross receipts" from interstate or foreign commerce is a tax upon the commerce itself and is forbidden by the Constitution. The following cases support appellant's position on this question:

Philadelphia & So. Mail S. S. Co. v. *Pennsylvania,* 122 U. S. 326;

Leloup v. *Mobile,* 127 U. S. 640, 647;

Galveston H. & S. A. R. Co. v. *Texas,* 210 U. S. 217;

Meyer v. *Wells, Fargo & Co.,* 223 U. S. 298, 300-301;

Crew Levick Co. v. *Pennsylvania,* 245 U. S. 292;

United States Glue Co. v. Town of Oak Creek, 247 U. S. 321;

New Jersey Bell Tel. Co. v. *State Board of Taxes and Assessment of the State of New Jersey,* 280 U. S. 338;

Anglo-Chilean Nitrate Sales Corp. v. *Alabama,* 288 U. S. 218, 225, 237;

Matson Navigation Co. v. *State Board, etc.*, 297 U. S. 441, 444;

Fisher's Blend Station v. *Tax Commission*, 297 U. S. 650, 665;

Puget Sound Stevedoring Co. v. *Tax Commission*, Decided by United States Supreme Court, November 8, 1937.

The second question is also substantial. Whether a statutory contract that municipal bonds "shall be exempt from taxation" is impaired by a later statute imposing a gross receipts tax upon the interest from such bonds, is a Federal question. The fact that such an exemption is contractual is clearly established by the decisions of this Court.

VonHoffman v. *City of Quincy*, 71 U. S. 535;

Northwestern Mutual Life Insurance Co. v. *Wisconsin*, 275 U. S. 136;

Macallen Co. v. *Massachusetts*, 279 U. S. 620.

In deciding that there has been a constitutional impairment of the contract, the Supreme Court of the United States must determine independently both the scope of the contract and whether the later statute does impair it. On these points, the state court's decision is not conclusive.

Louisiana R. & N. Co. v. *Behrmer*, 235 U. S. 164, 170, 171;

Columbia Railways Gas & Electric Co. v. *South Carolina*, 261 U. S. 236, 245;

United States Mortgage Co. v. *Matthews*, 293 U. S. 232, 236.

Where the securities by virtue of contract are exempt from taxation, a gross receipts tax upon the interest from such securities is in its essence a tax upon the securities themselves.

Pollock v. *Farmers Loan & Trust Co.*, 157 U. S. 429, 558, 581;

Pollock v. *Farmers Loan & Trust Co.*, 158 U. S. 601, 617, 637;

Eisner v. *Macomber*, 252 U. S. 189, 205;

Gillespie v. *Oklahoma*, 257 U. S. 501, 505;

Northwestern Mutual Life Ins. Co. v. *Wisconsin*, 275 U. S. 136, 140;

National Life Insurance Co. v. *United States*, 277 U. S. 508, 519-521;

Macallen Co. v. *Massachusetts*, 279 U. S. 620, 622.

The question therefore of whether the Gross Income Tax Act of 1933 can validly be applied to the interest received by appellant from the securities declared to be exempt from taxation does involve a substantial Federal question.

The opinion and judgment of the State Supreme Court could not have been rendered or entered without denying to appellant all of the rights asserted by it under the constitutional provisions relied upon, and said opinion and judgment cannot be rested upon any independent non-Federal grounds.

It is submitted that the judgment definitely and clearly draws in question the validity of the statute on the ground of its being repugnant to the Constitution of the United States, as required by Sec. 237(a) of the Judicial Code as amended, and that this appeal comes within the proper jurisdiction of this Court.

Bryant v. *Zimmerman*, 278 U. S. 63, 67.

Dated this 29th day of November, 1937.

Respectfully submitted,

Frederick E. Matson,
Harry T. Ice,
Attorneys for Appellant,
J. D. Adams Manufacturing Co.

APPENDIX A.

IN THE SUPREME COURT OF INDIANA

No. 26401.

William Storen, as Chief Administrative Officer of the Department of Treasury of the State of Indiana; Department of Treasury of the State of Indiana, Paul V. McNutt, William Storen, Floyd E. Williamson, as and Constituting the Board of Department of Treasury of the State of Indiana; Philip Lutz, Jr., as Attorney-General of the State of Indiana, *Appellants,*

v.

J. D. Adams Manufacturing Company, *Appellee.*

Appeal from Superior Court, Marion County.

Fansler, *J.*.

Appellee brought this action seeking a declaratory judgment construing certain portions of the Gross Income Tax Act of 1933 (Acts 1933, c. 50, p. 388, Burns' Ann. St. 1933, § 64-2601, *et seq.*). The facts were stipulated and are not in dispute. There was a judgment for appellee.

The ruling on appellants' motion for a new trial is assigned as error.

Appellee is an Indiana corporation, engaged in manufacturing machinery, tools, appliances, and equipment for the construction, improvement, and repair of roads and highways. Its home office, and principal place of business, and its only manufacturing plant, is located in the state of Indiana. It sells a substantial portion of its products to purchasers within the state, some to the ultimate user or consumer and the remainder to dealers who resell. It sells a substantial portion of its products, through selling agents or otherwise, to dealers in other states and in foreign countries. All sales made outside of the state are upon orders taken subject to the approval of the home office, shipment is made from the factory, and payment is made to the home office. Its receipts from business in

other states and foreign countries, during each of the four years immediately preceding the trial, were in excess of $1,000,000, and amounted to approximately 80 per cent of its entire gross income from the sale of its products. At certain seasons of each year it invests, for temporary periods, a substantial portion of its working capital in bonds or other obligations of municipal corporations within the state, which obligations are interest-bearing, and, by the statutes in force at the time of issuance, are exempt from taxation; and, since the 1st day of May, 1933, it has collected, as part of its gross income, interest on such obligations in excess of $2,500.

Upon these facts, the trial court held: "That said Gross Income Tax Act of 1933 does not by any of its terms or provisions authorize or require the assessment or collection of any tax upon the gross income derived by the plaintiff, or others similarly situated, from business so conducted in commerce between the State of Indiana and other states of the United States or between the State of Indiana and foreign countries, but such gross income is by said act expressly excepted from such tax." It further held that, in so far as the act purports or attempts to impose a tax upon gross income, consisting of interest upon tax-exempt securities, it impairs the obligation of contracts, and is void under the state and federal Constitutions. It further found that the plaintiff was not engaged in any business except manufacturing, as defined in section 3 (a) of the act, and that the law does not by any of its terms authorize or require the assessment of any tax upon the gross income of appellee, or others similarly situated, derived from sales to ultimate users or consumers, at any other or different rate than one-fourth of one per cent, the rate which applies to manufacturers.

Three questions are presented: (1) Is that part of appellee's gross income, which is derived from sales of appellee's products to ultimate users, taxable at one per cent, the rate which applies to those engaged in the business of retailing, or at one-fourth of one per cent, the rate which applies to those engaged in the business of manufacturing? (2) Is that part of appellee's gross income, derived from interest payments on tax-exempt bonds of municipal corporations

of the state of Indiana, taxable? (3) Is that part of appellee's gross income, which is derived from the sale of its products in interstate and foreign commerce, taxable?

Section 3 of the act provides for a tax "upon the entire gross income of every person engaged in the business of manufacturing" at the rate of one-fourth of one per cent, and "upon the entire gross income of every person engaged in the business of retailing" at the rate of one per cent.

It is appellee's contention that sale is an indispensable incident to the business of manufacturing, and that whether a person is engaged in manufacturing is not determined by the manner in which he sells his goods, and that those engaged in manufacturing are, under the statute, taxable at the rate of one-fourth of one per cent only, regardless of whether their sales are to jobbers, wholesalers, or at retail directly to the consumer. If this position can be sustained, it means that manufacturers, who operate exclusively through retail stores or stations and compete with retailers in the ordinary sense, have a discriminatory advantage by reason of the fact of manufacturing their own product. The goods sold by the ordinary retailer come down to him through a manufacturer, a jobber, and a wholesaler, and are burdened with one-fourth of one per cent tax upon the manufacturer, the jobber, and the wholesaler, and one per cent upon the retailer, a total of 1¾ per cent, while his competing retailer, who manufactures his own product, would pay but one-fourth of one per cent. There is nothing in the act which indicates a legislative design and intention to create such a discriminatory situation. The basic tax upon taxpayers generally is one per cent. Section 4 recognizes that the same person or corporation may be taxable upon different parts of his income at different rates, and provides that each person shall be subject to taxation at the highest rate applicable to any part of his gross income unless he shall segregate the parts subject to different rates. Some reason can be seen for taxing manufacturers, jobbers, and wholesalers at a lower rate, since their merchandise moves in larger quantities and in greater price competition, and since the articles manufactured and sold by them must be ultimately burdened with successive taxes.

A manufacturer, as the term is commonly understood, is one who processes raw material "and stands between the original producer and the dealer." Indiana Creosoting Co., *v.* McNutt, Governor, et al. (Ind. Sup. 1936), 5 N. E. (2d) 310, 314.

The question of whether there would be a sufficient constitutional basis for classification and discrimination between those who manufacture their own merchandise, and other retailers, need not be considered, since no legislative intention to so discriminate is apparent, and a reasonable interpretation of the act precludes such a conclusion.

The rate does not depend upon the business in which the taxpayer is primarily engaged, but upon the activity from which each item of his gross income is received. Sales to ultimate consumers must be regarded as retail sales, whether made by the producer of the article sold or another.

The court erred in concluding that that part of the income of a manufacturer, which was received from sales at retail to the ultimate users, is not taxable at one per cent.

The bonds from which the income was received are specifically exempted from taxation, but there is no statutory provision which exempts the interest from excise taxes which may be imposed by the state. In Orr *v.* Gilman (1902), 183 U. S. 278, 289, it was held by the Supreme Court of the United States: "That a transfer or succession tax, not being a direct tax upon property, but a charge upon a privilege exercised or enjoyed under the law of the State, does not, when imposed in cases where the property passing consists of securities exempt by statute, impair the obligation of a contract within the meaning of the Constitution of the United States." Upon the same reasoning, it does not offend against article 1, section 24, of the Constitution of Indiana. The gross income tax is not a tax upon property, but an excise upon a privilege. Miles et al. *v.* Department of Treasury et al. (1935), 209 Ind. 172, 199 N. E. 372.

The court erred in holding that that part of appellee's gross income, which consists of interest on tax-exempt bonds, is exempt from gross income tax.

It was held that section 6 (a) of the law excepts gross income derived from commerce between the several states and with foreign countries. Section 6, so far as it is pertinent, reads as follows: "There shall be excepted from the gross income taxable under this act: (a) So much of such gross income as is derived from business conducted in commerce between this state and other states of the United States, or between this state and foreign countries, to the extent to which the State of Indiana is prohibited from taxing under the Constitution of the United States of America." This clause excepts such gross income only to the extent that taxation is forbidden by the Constitution, and the act must be construed as contemplating a tax on all income that the state is permitted to tax. Courts will not prevent the carrying out of a legislative intention unless the Constitution clearly forbids. The act must be construed as levying the tax unless such a levy is violative of article 1, section 8, of the Federal Constitution. Final jurisdiction of questions involving the Federal Constitution is in the Supreme Court of the United States, and the principles announced in its decisions are controlling upon such questions. Any tax upon one engaged in interstate commerce is a burden upon interstate commerce, but all taxes are not illegal burdens. It is only where the tax is laid upon interstate commerce as such, or in such a manner as to discriminate against interstate commerce, that it is to be condemned. Those engaged in interstate commerce are not exempt from taxation by the states, and any tax that does no more than impose upon them or their property a reasonable share of the burdens of government will not be condemned. In passing on tax legislation, the court has looked beyond the form and language of the act, and its construction and characterization by the state courts, and determined its constitutionality in each instance from its practical operation and effect. This involves an examination of the law to ascertain the manner in which it operates and the effect upon the taxpayer.

It has been repeatedly held that a state tax, measured by gross receipts, which in effect does no more than burden the taxpayer engaged in interstate commerce with a fair share of the regular property taxes levied by the state, or its equivalent, cannot be condemned as violating the federal

Constitution. But the decisions sustain the rights of the state to levy excises against those engaged in interstate and foreign commerce, and therefore, while the cases refer to a fair share of the regular property taxes, they must be construed as establishing the rule that a statute will not be condemned if in effect it burdens those engaged in interstate commerce, only to the extent of their just share of governmental burdens, under any reasonable method of general taxation.

The statute here under consideration levies a tax upon all who are domiciled within the state, based upon the privilege of domicile, and transacting business, and receiving gross income, within the state, and measured by the amount of gross income. The rate upon income derived from manufacturing, mining, producing minerals, oil, and gas, timber, and agricultural products, and from wholesaling and jobbing commodities, is one-fourth of one per cent. The rate for income derived from all other businesses or occupations, including income from the sales of real estate, and the performance of contracts, and from the investment of capital, and all receipts from all other sources whatsoever, is one per cent. It is thus seen to be a general tax, affecting all who are domiciled within the state who receive income, except those whose income is less than $1,000. There are other minor exemptions of the usual character. The provisions of the law are discussed in detail in Miles *et al. v.* Department of Treasury *et al.*, *supra,* in which the law was held constitutional, and the tax an excise.

The statute was enacted concurrently with other legislation limiting levies upon property. The greater portion of the revenue raised goes back to local units of government for the maintenance of schools and other activities otherwise dependent upon property levies. Legislative history indicates that one of the purposes of the Gross Income Tax Law was to redistribute governmental burdens and relieve property of a tax burden which was thought to be too great.

In support of its contention that the tax imposed is not repugnant to the commerce provision of article 1, section 8, of the Constitution of the United States, appellants assert that the case of American Manufacturing Co. *v.* City of St. Louis (1919) 250 U. S. 459, 462, 463, 464, 465, is decisive of

the question. That case involved an ordinance of the city of St. Louis, imposing an excise tax upon manufacturers and merchants; the amount of the tax to be ascertained by, and proportioned to, the amount of sales of goods, whether sold within or without the state, and whether in domestic or interstate commerce. The ordinance was construed by the state Supreme Court as a license tax, graduated to accord to the amount of business carried on to the point of realizing profit or liquidation of loss by the sale of the product; that the fixing of the amount of the tax by the amount realized upon sale of the goods is equitable; that it is a tax upon the manufacturer for the privilege of pursuing his business under the protection of the laws of the state and city ordinances, notwithstanding the amount of the tax is ascertained by the final sale price of the goods within or without the state. It is held that this construction by the Supreme Court of the state is conclusive, but that, "as has been held very often, the question whether a state law or a tax imposed thereunder deprives a party of rights secured by the federal Constitution depends not upon the form of the act, nor upon how it is construed or characterized by the state court, but upon its practical operation and effect." It is said in the opinion:

"No tax has been or is to be imposed upon any sales of goods by plaintiff in error except goods manufactured by it in St. Louis under a license conditioned for the payment of a tax upon the amount of the sales when the goods should come to be sold. The tax is computed according to the amount of the sales of such manufactured goods, irrespective of whether they be sold within or without the State, in one kind of commerce or another; and payment of the tax is not made a condition of selling goods in interstate or in other commerce, but only of continuing the manufacture of goods in the City of St. Louis.

"There is no doubt of the power of the State, or of the city acting under its authority, to impose a license tax in the nature of an excise upon the conduct of a manufacturing business in the city. Unless some particular interference with federal right be shown, the States are free

to lay privilege and occupation taxes. Clark *v.* Titusville, 184 U. S. 329; St. Louis *v.* United Railways Co., 210 U. S. 266, 276.

"The city might have measured such tax by a percentage upon the value of all goods manufactured, whether they ever should come to be sold or not, and have required payment as soon as, or even before, the goods left the factory. * * *

"In the outcome the tax is the same in amount as if it were measured by the sale value of the goods but imposed upon the completion of their manufacture. The difference is that, for reasons of practical benefit to the taxpayer, the city has postponed payment until convenient means have been furnished through the marketing of the goods.

"In our opinion, the operation and effect of the taxing ordinance are to impose a legitimate burden upon the business of carrying on the manufacture of goods in the city; it produces no direct burden on commerce in the goods manufactured, whether domestic or interstate, and only the same kind of incidental and indirect effect as that which results from the payment of property taxes or any other and general contribution to the cost of government. Therefore, it does not amount to a regulation of interstate commerce. And, for like reasons, it has not the effect of imposing a tax upon the property or the business transactions of plaintiff in error outside of the State of Missouri, and hence does not deprive plaintiff in error of its property without due process of law.

"Our recent decisions cited in opposition to this view, Crew Levick Co. *v.* Pennsylvania, 245 U. S. 292, 297; Looney *v.* Crane Co., 245 U. S. 178, 188, and other cases of the same kinds referred to therein, are so obviously distinguishable that particular analysis is unnecessary."

It is said in Miles *et al. v.* Department of Treasury *et al.*, *supra,* 209 Ind. 172, on page 188, 199, N. E. 372, 379: "We conclude that the tax in question is an excise, levied upon those domiciled within the state or who derived income from sources within the state, upon the basis of the privilege of domicile or the privilege of transacting business within the state, and that the burden may reasonably be measured

by the amount of income. The reasoning which justified a tax upon the basis of domicile as readily supports and justifies a tax upon the basis of the right to receive income within, or transact business under the protection of, the state."

The St. Louis ordinance discriminates against those most likely to be engaged in interstate commerce—manufacturers and merchants—since it lays a burden on them that is not laid on others, while the law under consideration lays a burden upon every person domiciled in the state who receives a gross income. If there be discrimination, it is in favor of those likely to be engaged in interstate and foreign commerce, since they pay but one-fourth of one per cent, while other taxpayers pay one per cent. In other respects the differences in the law are in the form, the words, and not in the substance. The substantial difference that the law here is general and discriminates in favor of those engaged in interstate commerce, weighs in favor of constitutionality. Both taxes, in so far as they affect commerce, are measured by the gross income from the sale of merchandise. Both, in practical operation and effect, exact a contribution to the support of government, measured by the gross income, for the privilege of transacting business under the protection of the local sovereign. Neither was designed nor intended as a regulation of, or a tax or burden upon, interstate commerce as such, or as a discrimination against those engaged in interstate commerce. If the tax here is to be condemned, while the St. Louis ordinance is upheld, it must be because of the form of the enactment and the words used. By amendment, manufacturers and merchants could be taken out of the Gross Income Tax Law, and, by a new enactment, following the language of the St. Louis ordinance, they could be burdened exactly as they are burdened here. It is clear from the decisions that, under such circumstances, a tax will not be condemned as unconstitutional. Other statutes, levying taxes to be measured by gross receipts, have been condemned, but always upon the ground that they were discriminatory or that they levied a direct burden upon interstate or foreign commerce as such.

There are statements in U. S. Glue Co. *v.* Town of Oak Creek (1918) 247 U. S. 321, 326, 327, 328, 329, and Peck & Co. *v.* Lowe (1918) 247 U. S. 165, which have been considered as condemning taxes measured by gross income, merely because the amount of the tax is based upon gross income. Both opinions were written before the St. Louis Case above referred to, and, since a tax measured by gross income was there upheld, and taxes of the same character upheld in other cases, these decisions cannot have been so intended. The first case involved a net income tax of the state of Wisconsin; the second the federal net income tax. A general tax, measured by gross income, has never been passed upon by the Supreme Court of the United States, and no such tax was under consideration in the cases referred to. It must be concluded that the statements in those cases concerning gross income taxes were used as argument in defense of net income taxes, and not in condemnation of gross income taxes as such.

In U. S. Glue Co. *v.* Town of Oak Creek, *supra,* the court considered and sustained the Wisconsin Net Income Tax Law. The contention was that income derived from interstate commerce was not taxable. The tax was general, and not upon any particular business or calling. It is said in the opinion:

"It is settled that a State may not directly burden interstate commerce, either by taxation or otherwise. But a tax that only indirectly affects the profits or returns from such commerce is not within the rule. * * * (a) that the immunity of an individual or corporation engaged in interstate commerce from state regulation does not *not* prevent a State from imposing ordinary property taxes upon property having a situs within its territory and employed in interstate commerce; and (b) that the franchise of a corporation, although that franchise be the business of interstate commerce, is, as a part of its property, subject to state taxation, provided at least the franchise be not derived from the United States. * * *

"Yet it is obvious that taxes imposed upon property or franchises employed in interstate commerce must be paid from the net returns of such commerce, and diminish them

in the same sense that they are diminished by a tax imposed upon the net returns themselves."

It is further said:

"The distinction between direct and indirect burdens, with particular reference to a comparison between a tax upon the gross returns of carriers in interstate commerce and a general income tax imposed upon all inhabitants incidentally affecting carriers engaged in such commerce, was the subject of consideration in Philadelphia & Southern S. S. Co. *v.* Pennsylvania, 122 U. S. 326, 345, where the court, by Mr. Justice Bradley, said: 'The corporate franchises, the property, the business, the income of corporations created by a State may undoubtedly be taxed by the State; but in imposing such taxes care should be taken not to interfere with or hamper, directly or by indirection, interstate or foreign commerce, or any other matter exclusively within the jurisdiction of the Federal government.' Many previous cases were referred to.

"The correct line of distinction is so well illustrated in two cases decided at the present term that we hardly need go further. In Crew Levick Co. *v.* Pennsylvania, 245 U. S. 292, we held that a state tax upon the business of selling goods in foreign commerce, measured by a certain percentage of the gross transactions in such commerce, was by its necessary effect a tax upon the commerce, and at the same time a duty upon exports, contrary to §§ 8 and 10 of Article 1 of the Constitution, since it operated to lay a direct burden upon every transaction by withholding for the use of the State a part of every dollar received. On the other hand, in Peck & Co. *v.* Lowe, *ante*, 165, we held that the Income Tax Act of October 3, 1913, c. 16, § 2, 38 Stat. 166, 172, when carried into effect by imposing an assessment upon the entire income of a corporation, approximately three-fourths of which was derived from the export of goods to foreign countries, did not amount to laying a tax or duty on articles exported within the meaning of Art. 1, § 9, cl. 5 of the Constitution. The distinction between a direct and an indirect burden by way of tax or duty was developed, and it was shown that an income tax

laid generally on net incomes, not on income from exportation because of its source or in the way of discrimination, but just as it was laid on other income, and effecting only the net receipts from exportation after all expenses were paid and losses adjusted and the recipient of the income was free to use it as he chose, was only an indirect burden.

"The difference in effect between a tax measured by gross receipts and one measured by net income, recognized by our decisions, is manifest and substantial, and it affords a convenient and workable basis of distinction between a direct and immediate burden upon the business affected and a charge that is only indirect and incidental. A tax upon gross receipts affects each transaction in proportion to its magnitude and irrespective of whether it is profitable or otherwise. Conceivably it may be sufficient to make the difference between profit and loss or to so diminish the profits as to impede or discourage the conduct of the commerce. A tax upon the net profits has not the same deterrent effect, since it does not arise at all unless a gain is shown over and above expenses and losses, and the tax cannot be heavy unless the profits are large. Such a tax, when imposed upon net incomes from whatever source arising, is but a method of distributing the cost of government, like a tax upon property, or upon franchises treated as property; and if there be no discrimination against interstate commerce, either in the admeasurement of the tax or in the means adopted for enforcing it, it constitutes one of the ordinary and general burdens of government, from which persons and corporations otherwise subject to the jurisdiction of the States are not exempted by the Federal Constitution because they happen to be engaged in commerce among the States."

It will be noted that the statement that property taxes are paid from *net* returns is not accurate, since an ordinary property tax must be paid whether there are net returns, or any returns, from the property. In Philadelphia & Southern Steamship Co. *v.* Pennsylvania, *supra,* 122 U. S. 326, on pages 344, 345, the court said of the tax: "We do not think that it can properly be regarded as an income tax. It is not a general tax on the incomes of all the inhabitants of the state; but a special tax on transportation companies.

Conceding, however, that an income tax may be imposed on certain classes of the community, distinguished by the character of their occupations; this is not an income tax on the class to which it refers, but a tax on their receipts for transportation only. * * * It is unnecessary, therefore, to discuss the question which would arise if the tax were properly a tax on income. It is clearly not such, but a tax on transportation only."

While it is true that in the Peck Case reference is made to the fact that the levy is upon the income net after all the expenses are paid and losses are adjusted, stress is put upon the fact that there is no discrimination, and that the tax is a general tax. A law which taxes the net income of persons engaged in foreign commerce, to the exclusion of all other persons, could not be upheld, notwithstanding the levy is effective only after expenses are paid and losses adjusted. Such a law would clearly be held invalid, since it would be directly discriminatory, and would not have the saving grace of being a general law affecting all persons, and thus the effect on commerce an incidental feature only. It must be concluded that the fact that the tax was general, and not discriminatory, controlled the decision. In the discussion in both net income tax cases, the court must have had in mind gross income tax laws affecting special classes, such as had been dealt with in the Philadelphia & Southern Steam Ship Co. Case and the Crew Levick Co. Case, and not general gross income tax laws. It is true that: "A tax upon gross receipts affects each transaction in proportion to its magnitude and irrespective of whether it is profitable or otherwise." But it has never been denied, and has been expressly recognized, that general property taxes are a burden upon commerce, and that, especially where the value of the property is determined in whole or in part by gross receipts, the tax upon the property affects each transaction in proportion to its magnitude. Property taxes must be paid from the proceeds of the business if it is to continue, and in ordinary accounting taxes are set up as a cost which must be taken into consideration in fixing selling prices, and it may be said, concerning an ordinary property tax, that: "Conceivably it may be sufficient to

make the difference between profit and loss or to so diminish the profits as to impede or discourage the conduct of the commerce." A manufacturer or wholesaler, located in a city or state where property taxes are high, access to market being equal, cannot compete upon even terms with an equally equipped competitor located in a community where property taxes are exceptionally low. The difference may be slight, but it is an impediment. A tax of one-fourth of one per cent upon gross income may amount to no more than the difference in property taxes in a community where the taxes are high and another where taxes are low. If a given concern does $1,000,000 of export business, and earns a net profit of 5 per cent, or $50,000, the result is the same whether it is taxed at one-fourth of one per cent upon gross income or five per cent upon net income. Selling prices are fixed, to some extent at least, by competition and market resistance, and in either event the actual net income result is the same, and the actual burden upon the business is identical. It would seem therefore that the most cogent reasons given in the Peck Case, for supporting the net income tax law, are the fact that it is not discriminatory, and that it is a general tax. These are the reasons consistently given in support of property taxes, including those in which the value of the property for tax purposes is measured by gross income. All taxes are a burden, but those that have been condemned, as in Philadelphia & Southern Steamship Co. *v.* Pennsylvania, *supra,* and Crew Levick Co. *v.* Commonwealth of Pennsylvania, *supra,* were not general taxes laid upon all citizens, and they were on their face discriminatory against commerce.

It is said in Cudahy Packing Co. *v.* State of Minnesota (1918), 246 U. S. 450, 453: "On the other hand, if what is done is to reach the property and not to tax the gross earnings, the latter being taken merely as an index or measure of the value of the former, it well may be that the objection urged against the tax is untenable; for, as this court has said, 'by whatever name the tax or taxes may be called that are fixed by reference to the value of the property, if they are not imposed because of its use in interstate or foreign commerce, and if they amount to no more than would be

legitimate as an ordinary tax upon the property, valued with reference to the use in which it is employed, they are not open to attack' as restraining or burdening such commerce.''

It is said in many of the cases that, if a tax on gross income or gross revenue (and none of the cases deal with a general tax) is in lieu of other taxes on property, the tax is valid, but that if it is in addition to property taxes, and a tax upon the income, it is an undue and forbidden burden. But, according to the oft-repeated statements in the opinions that the name or character of the tax is of secondary importance, and that undue burden and discrimination is the primary thing, it will be seen that it is not important whether the tax is in fact a property tax or an excise. Pullman Co. *v.* Richardson, etc. (1923) 261 U. S. 330. It must therefore be assumed that the decisions were not intended to lay down the rule that a tax based upon gross income, to be valid, must be a property tax, while a tax on net income may be sustained although it is an excise. It seems clear from all the cases that the distinction lies in discrimination. In the Philadelphia & Southern Steamship Co. Case the tax was upon the gross income because it was derived from interstate commerce. A tax upon property, because it is used in interstate commerce, would likewise be condemned. It was held in Galveston, etc., R. Co. *v.* State of Texas (1908) 210 U. S. 217, that a tax, by whatever name, will be upheld if it amounts to no more than the ordinary tax on property or the just equivalent. In other words, if it is designed and intended only as the taxpayer's just share of the cost of government, and not as a burden upon, or discrimination against, interstate commerce, it will not be condemned. ''Even interstate business must pay its way.'' Postal-Telegraph Cable Co. *v.* City of Richmond (1919) 249 U. S. 252, 259. In Pullman Co. *v.* Richardson, etc., *supra,* 261 U. S. 330, on page 339, it was said, in sustaining the law: ''There is no ground for thinking that it operates as a discrimination against interstate commerce.'' And in Bass, etc., Ltd., *v.* State Tax Commission (1924) 266 U. S. 271, 283, that the act was not a mere act ''under the guise of legitimate taxation.'' In U. S. Glue Co. *v.* Town of Oak Creek, *supra,*

it is said that a corporation engaged in interstate commerce is liable to ordinary taxes, and in Shaffer *v.* Carter, State Auditor, *et al.,* (1920) 252 U. S. 37, that the states have full power to tax their people and their property. It is said in Matson Navigation Co. *et al. v.* State Board of Equalization, etc., *et al.* (No. 346, March 2, 1936) — U. S. — that: "Unquestionably annual profits, gains or net income derived from business done within the State is an indication sufficiently significant to be deemed a reasonable base on which to compute the value of that use." The case involved corporate franchises, but it is unquestionably true also that annual profits, gains, or net income have sufficient significance to be deemed a reasonable basis for taxation of citizens generally. No reason is pointed out why gross income is not in the same category, and in Miles *et al. v.* Department of Treasury *et al., supra,* it was held to have sufficient significance to be a reasonable basis for a tax upon residents of the state generally. If business is done, there is a burden upon the facilities of government without regard to whether there is profit. The state functions for those who make a profit and for those who do not. Governmental instrumentalities are not designed to guarantee a profit. The state serves both, those who profit and those who do not. Why one who manufactures and sells a $1,000,000 of machinery in this state and makes no profit should be exempt from taxation, while his competitor who manufactures and sells a like amount and makes a profit should be compelled to pay, is not clear.

There is nothing in the cases that condemns a non-discriminatory gross income tax if it does nothing more than burden corporations engaged in interstate commerce with their proper share of the burdens of the government under which they conduct their operations. The tax under consideration here is general. It not only does not discriminate against those engaged in interstate commerce, but seems to discriminate in their favor. It may be assumed that most taxpayers engaged in interstate commerce are manufacturers and wholesale dealers in merchandise. They are taxed at the rate of one-fourth of one per cent on their gross incomes. The taxpayer generally is taxed at the rate of one per cent of his gross income.

In Miles *et al. v.* Department of Treasury *et al., supra,* 209 Ind. 172, on pages 191, 192, 199 N. E. 372, 380, 381, it is said: "The lower rate is imposed upon those whose activities bring, or are likely to bring, them in competition with residents of other states, and who are subject to such competition within the state of Indiana as well as without. Any tax measured by the extent of the business activities of such persons handicaps them in their activities. It is within the scope of legislative power in levying taxes to vary rates upon considerations of public policy, and, if upon the theory that to do otherwise might tend to discourage given industries, it may put a lighter burden upon them so long as all in like circumstances are treated alike."

It is well settled that, if any state of facts reasonably can be conceived that will sustain a law, the existence of that state of facts must be assumed, and the burden is upon him who assails the law to show injury in the facts. There is no discrimination under this law between manufacturers and wholesalers residing in the state, and, in so far as those engaged in interstate and foreign commerce are concerned, it must be assumed that their competitors in other states and in foreign countries "bear their proper share of the burdens of the government under whose protection they conduct their operations."

The purpose of the Gross Income Tax Law was to broaden the basis of taxation and to relieve property of some of the burden of maintaining the government. It was purposed to reach those who paid little or no property tax and who received benefits or potential benefits from the instrumentalities of the government for which they did not carry a proportionate share of the burden. Property-owner taxpayers on the whole are benefited. Some property owners, though their property tax is lightened, may pay a larger proportion of taxes because of the gross income tax, some may pay less, but it is clear that the owner of a given amount of property, who conducts a large manufacturing business in the state, puts more burden or potential burden upon the instrumentalities of government, maintained and standing by for his protection, than one with a like amount of property who conducts a smaller business, regardless of whether the products of the business are sold within or without the state.

Whether the combined property and gross income tax of appellee is more than its property tax before the enactment of the Gross Income Tax Law does not appear, nor is it material. The action is brought by appellee for its own benefit and for those in like situation, which we assume to mean those who are engaged in interstate or foreign commerce, including farmers who sell their livestock and other produce outside the state. Whether each individual will now pay more or less tax than before will be governed by the amount of taxable property owned in proportion to gross income, and by the location of the property, since taxes for local purposes vary in different communities and in different years. Such unusual expenses of government as poor relief, in connection with the high rate of tax delinquency during depression years, tended to increase property tax rates in some communities, but such current fluctuations or differences due to temporary local conditions, or the variation in the amount of the total taxes collected for governmental purposes, cannot control or affect the result. The evident legislative purpose was to levy a tax generally without discrimination against those who were engaged in whole or in part in interstate commerce. It was the purpose to broaden the tax bases in order to relieve appellee's property, and the property of all others, of what the Legislature considered an unjust burden. If appellee was not relieved of property taxes to the extent of its new burden under the Gross Income Tax Law, it is due to circumstances over which the Legislature could exert no control, since many pay taxes on gross income who paid little or no taxes on property; and, since the total taxes collected were approximately the same as before, it is obvious that property owners generally are paying no more in property and gross income taxes, but are paying less property taxes than formerly. It cannot be said that the tax is designed to, or that it does, levy upon appellee and others engaged partly in interstate or foreign commerce more than their fair proportionate share of the expense of maintaining the government under which they conduct their business.

Appellee contends that the tax upon gross income is not the same as a tax upon the value of manufactured goods,

since "there are many manufacturers, wholesalers, and merchants in Indiana whose goods are shipped almost entirely by express, parcel-post, truck or freight not prepaid, and hundreds of them, including appellee, who sell their goods in other states at a delivered price which takes into account handling, transportation, and other costs incidental to the interstate character of the business; and in every such case, the gross income tax levied on such gross receipts constitutes a direct tax and burden upon interstate commerce."

Clause (f) of section 1 of the act provides: "That the term 'gross income' shall not include cash discounts allowed and taken on sales; nor freight prepaid by the taxpayer and repaid to him by the purchaser; goods, wares or merchandise, or the value thereof, returned by customers when the sale price is refunded either in cash or by credit; nor the sale price of any article accepted as part payment on any new article sold, if and when the full sale price of the new article is included in the 'gross income' subject to taxation under this act." The question of transportation charges included in the amount of sales, which is a basis for a determination of the tax, is not discussed in the St. Louis Case, but it is clear that here the Legislature endeavored to exclude transportation charges and other receipts of cash income which do not come to the taxpayer on account of the value of his merchandise. If, as contended, there are manufacturers, wholesalers, and merchants, who sell their goods at a delivered price outside of the state, including handling and transportation charges in the price of the goods, so that thus the handling and transportation charges become a part of their gross income upon which they are taxed, the remedy is in their own hands. They may at their option price their goods at the factory, or their place of business, and add the transportation costs. One can hardly complain of a law under which he is only burdened at his option.

The court erred in holding that the law does not authorize or require the assessment of the tax upon the gross income of appellee, and others similarly situated, derived from business conducted in interstate and foreign commerce.

Judgment reversed, with instructions to enter judgment for appellants, as indicated by this opinion.

IN THE SUPREME COURT OF INDIANA.

No. 26,401.

WILLIAM STOREN, as Chief Administrative Officer of The Department of Treasury of the State of Indiana; DEPARTMENT OF TREASURY OF THE STATE OF INDIANA, PAUL V. McNUTT, WILLIAM STOREN, FLOYD E. WILLIAMSON, as Constituting the Board of Department of Treasury of the State of Indiana; PHILIP LUTZ, JR., as Attorney General of the State of Indiana, *Appellants,*

vs.

J. D. ADAMS MANUFACTURING COMPANY, *Appellee.*

Appeal from Marion Superior Court, Room 5.

TREANOR, J., Dissenting:

I concur with the first two holdings of the court, namely (1) that that part of appellee's gross income which is received from sales to the ultimate users of appellee's products is taxable at one per cent, and (2) that the imposition of a gross income tax on interest derived from tax exempt bonds of municipal corporations does not impair the obligation of contract. I dissent from the holding and the reasoning supporting it, that a tax imposed upon gross income of appellee derived from interstate and foreign commerce, is not repugnant to the commerce provision of Article 1, Section 8 of the Constitution of the United States under the law as announced by the Supreme Court of the United States.

In appraising the reasoning and decisions of the Supreme Court of the United States on this question, it is necessary to keep in view a few fundamental, and guiding rules which the Supreme Court of the United States has consistently applied when considering the question of whether a particular tax law, or tax scheme, of a state violates the interstate commerce clause of the Federal Constitution. It is obvious at the outset that no state tax law ever purports to regulate commerce among the states. Consequently it is the effect of the imposition of the tax burden which de-

termines whether the particular tax law is such that it can be said to constitute a regulation of commerce among the states. No state, under our Federal Constitution, has the power to regulate commerce among the states, and, consequently, if the actual effect of the imposition of a particular tax burden constitutes a regulation of interstate commerce, the statute imposing the burden is invalid. On the other hand the Supreme Court of the United States consistently has recognized that if it is within the power of a state to impose a tax burden upon a particular subject of taxation, the imposition of such a tax burden is not obnoxious to the interstate commerce clause simply because there may be some indirect burden falling upon transactions which fall within the category of commerce among the states.

In determining whether or not the burden imposed by a state tax law constitutes a regulation of interstate commerce the Supreme Court of the United States has held undeviatingly that it is a regulation of commerce if it imposes a direct burden upon such commerce; and has repeadedly stated that a tax measured by the gross receipts, arising from interstate business, is such a burden as it is "by its necessary effect a tax upon such commerce, and therefore a regulation of it."[1] In so holding the Supreme Court has taken the view that any action by a state which directly interferes with free flow of commerce among the states by obstructing or burdening such flow of commerce is in legal contemplation a regulation of it. Consistently, with that view the rule frequently has been stated that a tax upon gross receipts from interstate commerce is in violation of the commerce clause.

On the other hand the United States Supreme Court has held consistently that if a tax imposed is upon a subject of taxation, in respect to the taxing of which the state has untrammeled power, such tax does not offend against the commerce clause even though the effect upon the business of particular individuals or corporations may be such as to ultimately and indirectly affect their interstate transactions. In accordance with the latter view excise taxes,

[1] *Crew Levick Co.* v. *Pennsylvania* (1917), 245 U. S. 292.

or taxes upon property, have been held not to violate the commerce clause even though the gross income of individuals and corporations derived from interstate transactions is used as one of the elements in determining the value of the privilege or the property which is subjected to the tax.

Appellant relies strongly upon the case of American Manufacturing Company *v.* City of St. Louis.[2] The tax in that case was held to be an excise tax upon the privilege of engaging in the business of manufacturing; and it was pointed out that gross income or receipts served as a measure of value of the privilege which was subjected to the excise tax. The tax had been imposed by the City of St. Louis under an act of the Missouri Legislature which authorized that city that to "license, tax and regulate * * * the occupation of merchants and manufacturers, and to graduate the amount of annual license imposed upon them in proportion to the sales made by such merchant or manufacturer during the year next preceding any fixed date."

To bring the instant case within the holding in the American Manufacturing Company *v.* City of St. Louis it would be necessary to construe the Gross Income Tax Act as imposing a privilege tax upon the occupation of manufacturing. It is clear that the General Assembly, in the exercise of the taxing power of Indiana, can impose such a tax. But I am convinced that appellee is correct in its contention that our present Gross Income Act does not impose a tax upon the privilege of engaging in the business of manufacturing. In so far as the tax in question may be considered a privilege tax, it must be treated as a tax upon the privilege of receiving gross income. In the title of the Act the tax which is being imposed is called "A tax upon the receipt of gross income;" and in Section 2 it is declared that the tax imposed is to be "measured by the amount or volume of gross income;" and that "such tax shall be levied upon the entire gross income of all residents * * *." It was stated by this Court in Miles *v.* Department of Treasury,[3] "that the tax in question is an

[2] (1918) 250 U. S. 459.
[3] (1935) 199 N. E. 372, 374, — Ind. —.

excise, levied upon those domiciled within the state or who derive income from sources within the state, upon the basis of the privilege of domicile or the privilege of transacting business within the state, and that the burden may reasonably be measured by the amount of income.''

Appellant relies upon Section 1-f of the Gross Income Tax Act to support his contention that the tax is ''not only upon a privilege exercised wholly within the State of Indiana, but this privilege is measured by the value of the articles manufactured.'' The particular provision relied upon is as follows: '' 'That the term gross income shall not include cash discounts allowed or taken on sales. Nor freight prepaid by the taxpayer and repaid to him by the purchaser.' '' Appellant urges that by the foregoing provision the words ''gross income'' are, in effect, defined to mean the value of the manufactured products at the plant. I cannot attach any such significance to the provision quoted. I think the plain intent of the language quoted from Section 1-f is to prevent the inclusion in gross income of certain items which in reality form no part of ones gross income. This is more apparent when one reads all of Section 1-f.

It is my opinion that the tax imposed by our Gross Income Act is a tax upon gross income or gross receipts. And consequently, appellants third proposition reduces itself to the question of whether that part of appellee's gross income which is derived from the sale of its products in interstate and foreign commerce is taxable under the Constitution of the United States of America. And if such part of appellee's gross income is not taxable under the Constitution of the United States, then it is not taxable by our Gross Income Tax Act which expressly exempts ''so much of such gross income as is derived from business conducted in commerce between this State and foreign countries, to the extent to which the State of Indiana is prohibited from taxing under the Constitution of the United States of America.''[4] Therefore, the answer to the third question as presented by this appeal must be found in the decisions of the Supreme Court of the United States.

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[4] Sec. 6 (a) Gross Income Tax Act, 1933, Ch. 50.

By Article 1, Sec. 9 of the United States Constitution Congress is denied the power to levy any tax or duty "on articles exported from any state." And in the case of Peck & Co. *v.* Lowe,[5] the Supreme Court was required to determine whether Section 9 was violated by a congressional act which levied a tax upon the net income derived from export sales. In reaching the conclusion that Section 9 was not violated the Supreme Court emphasized the fact that the tax was levied upon net income. The thought of the Court is expressed in the following: "The words of the act are 'net income arising or accruing from all sources.' There is no discrimination. At most, exportation is affected only indirectly and remotely. The tax is levied after exportation is completed, after all expenses are paid and losses adjusted, and after the recipient of the income is free to use it as he chooses. Thus what is taxed—the net income—is as far removed from exportation as are articles intended for export before the exportation begins. If articles manufactured and intended for export are subject to taxation under general laws up to the time they are put in course of exportation, as we have seen they are, the conclusion is unavoidable that the net income from the venture when completed, that is to say, after the exportation and sale are fully consummated, is likewise subject to taxation under general laws. In that respect the status of the income is not different from that of the exported articles prior to the exportation."

In Crew Levick Co. *v.* Pennsylvania,[6] the United States Supreme Court had before it. "The bare question * * * whether a state tax imposed upon the business of selling goods in foreign commerce, in so far as it is measured by the gross receipts from merchandise shipped to foreign countries, is in effect a regulation of foreign commerce or an impost upon exports, within the meaning of the pertinent clauses of the Federal Constitution." The Court concluded, p. 295-96, that the "imposition of a percentage upon each dollar of the gross transactions in foreign commerce" was "by its necessary effect a tax upon such commerce, and

[5] (1917) 247 U. S. 165, 174-75.
[6] (1917) 245 U. S. 292, 295.

therefore a regulation of it; and, for the same reason" was "in effect an impost or duty upon its exports."

The two foregoing cases furnished the grounds of decision for the United States Supreme Court in the later case of United States Glue Co. *v.* Oak Creek.[7] The question before the Court in that case was "whether a State, in levying a general income tax upon the gains and profits of a domestic corporation, may include in the computation the net income derived from transactions in interstate commerce without contravening the commerce clause of the Constitution of the United States." The Supreme Court assumed that the answer to the question depended upon whether the tax in question imposed a direct or indirect burden upon interstate commerce; and found the correct line of distinction illustrated in Crew Levick Co. *v.* Pennsylvania and Peck & Co. *v.* Lowe, *supra.* The following excerpts are from the opinion in U. S. Glue Co. *v.* Oak Creek, *supra,* pp. 328, 329.

"The difference in effect between a tax measured by gross receipts and one measured by net income, recognized by our decisions, is manifest and substantial, and it affords a convenient and workable basis of distinction between a direct and immediate burden upon the business affected and a charge that is only incidental. A tax upon gross receipts affects each transaction in proportion to its magnitude and irrespective of whether it is profitable or otherwise. Conceivably it may be sufficient to make the difference between profit and loss, or to so diminish the profit as to impede or discourage the conduct of the commerce. A tax upon the net profits has not the same deterrent effect, since it does not arise at all unless a gain is shown over and above expenses and losses, and the tax cannot be heavy unless the profits are large."

* * * * * * *

"And so we hold that the Wisconsin income tax law, as applied to the plaintiff in the case before us, can not be deemed to be so direct a burden upon plaintiff's interstate

[7] 247 U. S. 321, p. 326.

business as to amount to an unconstitutional interference with or regulation of commerce among the States. It was measured not by the gross receipts, but by the net proceeds from this part of plaintiff's business, along with a like imposition upon its income derived from other sources, and in the same way that other corporations doing business within the State are taxed upon that proportion of their income derived from business transacted and property located within the State, whatever the nature of their business."

Under the holding in Crew Levick Company *v.* Pennsylvania, *supra,* and the reasoning in the two cases of U. S. Glue Company *v.* Oak Creek and Peck & Co. *v.* Lowe, *supra,* it must be concluded that a tax upon that part of appellee's income which is received from its sales in interstate and foreign commerce would constitute a direct burden upon interstate and foreign commerce, and that such a tax would violate the interstate and foreign provision of the United States Constitution as construed by the Supreme Court of the United States. And consequently it is my opinion that the legislative intent, as clearly expressed in Section 6 (a) of the Gross Income Tax Act, is not to impose a tax upon that part of appellee's gross income which is derived from sales transactions in interstate and foreign commerce.

It is my opinion that the trial court was not in error in deciding that the Gross Income Tax Act does not impose a tax upon that part of appellee's gross income which is derived from sales in interstate and foreign commerce.

APPENDIX B.

(Temporary Regulation 3801—The Department of Treasury of Indiana—Gross Income Tax Regulations Issued July 1, 1937.)

"Temporary Regulation 3801. Deferment of Payment of Gross Income Tax Upon Gross Receipts Derived from Transactions in Interstate Commerce. Under the provisions of former Regulation 190 (approved July 31, 1934), taxpayers were permitted to defer the payment of gross in-

come tax upon gross receipts which were derived from transactions made in interstate commerce and which had been segregated upon their books and records, pending a decision of the Indiana Supreme Court in the case of J. D. Adams Manufacturing Company *vs.* The Department of Treasury.

Regulation 190, paragraph 2, provided:

> 'However, every taxpayer engaged in the business of manufacturing, wholesaling, jobbing or retailing and having gross receipts from interstate sales, will be required to keep a separate account of all such gross receipts and in the event it is the decision of the Supreme Court that the State of Indiana may assess and collect a tax on such gross receipts, then every taxpayer having receipts from interstate sales will be required to make amended returns for all periods for which returns have been made prior to such decision and to include therein all such gross receipts.'

The Indiana Supreme Court, on April 30, 1937, ruled in the J. D. Adams Manufacturing Company case, that receipts derived from business conducted in interstate and foreign commerce are properly taxable under this Act. However, the plaintiff in the Adams case contemplates appealing such decision to the United States Supreme Court. In view of these circumstances, Regulation 190 is hereby modified, so as to extend the privilege of deferment of payment of the tax on such gross receipts, but to cancel the privilege of deferring the reporting thereof.

Therefore, pending an appeal to, and a final decision of, the United States Supreme Court in the case of J. D. Adams Mfg. Co. *v.* The Department of Treasury of Indiana, any taxpayer under the Indiana Gross Income Tax Act may defer the payment of gross income tax upon such part of his gross receipts as is derived from transactions in interstate commerce.

The considerations and conditions under which this privilege of deferred payment is granted are:

1. That each such taxpayer report by August 15, 1937, upon special information forms No. 23-A, prescribed by the

Gross Income Tax Division of the Department of Treasury of Indiana, all gross receipts derived from transactions in interstate commerce and received on and after May 1, 1933, and prior to April 1, 1937.

2. That each such taxpayer, on or before July 15, 1937, and on or before the final due date of each succeeding taxable period, prior to the time the decision of the United States Supreme Court is given, report upon special information forms No. 24, prescribed by said Department, all gross receipts derived from transactions in interstate commerce and received on and after April 1, 1937. Such reports shall be concurrent with and in addition to the reporting of such receipts upon the regular periodical returns.

3. That each such taxpayer shall, upon such special information reports, segregate such receipts as to rate of classification of 1% and 1/4 of 1%.

The privilege of deferring the payment of tax computable upon the receipts reported is hereby granted, contingent upon the strict compliance with the above requirements and, while this regulation is in effect, no penalties or interest will be charged against any taxpayer so complying and availing himself of the deferment privilege. Taxpayers who receive or have received after May 1, 1933, receipts from transactions in interstate commerce, and who do not comply with the requirements herein will be subjected to the prescribed procedure for collection of the tax, penalties and interest.

The Department reserves the right to adjudicate in every case whether or not there exist sufficient elements of interstate commerce to allow the deferment privilege to apply.

The mere fact that a sale is to a place or person outside the State of Indiana will not of itself be sufficient to classify the transaction as interstate commerce, but such transactions must have all the elements of interstate commerce before the taxpayer will be permitted to avail himself of the deferment privilege herein granted.

Corporations contemplating dissolution or withdrawal, and fiduciary entities seeking final closure by courts, must satisfy the Department that any tax potentially due upon

such receipts will be paid, by indemnifying the Department against loss of tax by good and sufficient bond or other security acceptable to the Department, before Certificates of Clearance will be issued.

In the event that the United States Supreme Court decides in the aforesaid case that the State may lawfully impose gross income tax upon receipts from transactions in interstate commerce, then the deferment privilege herein granted shall automatically terminate; this regulation will immediately become inoperative, and each taxpayer who has, by provisions of former regulations or hereunder, deferred the payment of any such tax will be required to pay all tax due, in a manner to be prescribed by regulations issued by the Department at that time."

The foregoing regulations are hereby made and promulgated by the Department of Treasury and supersede any and all former regulations heretofore issued. These regulations having been fully made and adopted by the Department of Treasury, and signed by the Director of the Gross Income Tax Division of the Department of Treasury, and approved by the Treasurer this 25th day of June, 1937, they are effective on and after the 1st day of July, 1937.

CLARENCE A. JACKSON,
Director, Gross Income Tax Division of
The Department of Treasury of Indiana.

Supreme Court of the United States

October Term, 1937

No. 641

J. D. ADAMS MANUFACTURING COMPANY,
Appellant,

vs.

WILLIAM STOREN, as Chief Administrative Officer of The Department of Treasury of the State of Indiana, et al.,
Appellees.

APPEAL FROM THE SUPREME COURT OF THE STATE OF INDIANA

BRIEF FOR APPELLANT

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CENTRAL PUBLISHING COMPANY, INDIANAPOLIS, INDIANA

INDEX

CITATIONS

Supreme Court of the United States

October Term, 1937

No. 641

J. D. Adams Manufacturing Company,
Appellant,

vs.

William Storen, as Chief Administrative Officer of The Department of Treasury of the State of Indiana; Department of Treasury of the State of Indiana; Paul V. McNutt, William Storen, Floyd E. Williamson, as and constituting The Board of Department of Treasury of the State of Indiana; Philip Lutz, Jr., as Attorney General of the State of Indiana,
Appellees.

On Appeal From the Supreme Court of the State of Indiana

BRIEF FOR APPELLANT

The Opinions Below

The majority and dissenting opinions of the Supreme Court of Indiana are not yet officially reported. Both

opinions are to be found in 7 N. E. (2d) 941, also in the Record, pp. 43, 61, and Appendix A in the Statement as to Jurisdiction.

Jurisdiction

Paragraph 1 of Rule 12 of the rules of this Court has been complied with, and probable jurisdiction noted by this Court on January 10, 1938.

Questions Presented

The questions presented for decision in this case are:

1. Whether the gross income tax law of Indiana as applied to gross receipts derived from interstate and foreign commerce lays an illegal burden on such commerce and an impost or duty upon exports under Article I, Section 8 and Section 10 of the Federal Constitution; and

2. Whether said law as applied to gross receipts of interest from Indiana tax-exempt bonds constitutes an impairment of the obligation of contract under Article I, Section 10 of the Federal Constitution.

The Statute Involved

The statute involved is the "Gross Income Tax Act of 1933," Ch. 50, Indiana Acts 1933, p. 388; Ind. Stat. Ann. (Burns) 1933, Sec. 64-2601, et seq. The pertinent provisions of the Act will be found in the Appendix A, *infra,* pp. 55-60.

Statement

The facts in the case were stipulated, the trial court made findings thereon, and judgment was entered in favor

of appellant* on all questions raised in the complaint (R. 16-21). Certain points not contested on appeal in the state Supreme Court or involving construction of the statute alone are not presented here. The facts set forth in the stipulation and findings, so far as pertinent on this appeal, may be summarized as follows:

Appellant is an Indiana corporation engaged in manufacturing machinery and equipment for the construction and repair of highways (R. 25, 17). Its home office, principal place of business and only manufacturing plant are at Indianapolis, Indiana (R. 25, 17). It pays state and local taxes on its real and personal property located in the State, and the tax on gross receipts here involved is in addition thereto (R. 25). Approximately eighty per cent (80%) of its products are sold to customers in states other than Indiana and in foreign countries (R. 28, 17). All sales made to customers located outside the State of Indiana are upon orders taken subject to approval of the home office (R. 26, 17). Shipments are made from the factory, and payments made to and received at the home office (R. 26, 17). Receipts from business in other states and foreign countries for each of the four years preceding the trial were in excess of One Million Dollars ($1,000,000), and substantial specific sales were made in other states and foreign countries subsequent to May 1, 1933, effective date of the Act, and before the complaint was filed, and cash had

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*Note:—J. D. Adams Mfg. Co. was plaintiff in the trial court, appellee in the state Supreme Court, and is appellant in this Court. William Storen et al. were defendants in the trial court, appellants in the state Supreme Court, and are appellees in this Court.

In this brief (excepting quotations), "appellant" always refers to J. D. Adams Mfg. Co.; "appellees" always refers to William Storen et al.

been received in payment therefor (R. 26, 27). It was estimated that gross receipts of appellant from the sales of its products in interstate and foreign commerce would continue to be a substantial portion of its entire gross income each year (R. 28-29).

Prior to date of passage of the Act, appellant had acquired, and on the effective date of the Act had in its possession, bonds and other obligations issued by municipal corporations of the State of Indiana in excess of Two Hundred Thousand Dollars ($200,000) face value (R. 29, 18). Such obligations at the time of their issuance were declared by statute to be exempt from taxation (R. 29, 18). Subsequent to May 1, 1933, and before filing the complaint, appellant had collected and received as interest earned on such tax-exempt obligations in excess of Two Thousand Five Hundred Dollars ($2,500) (R. 29).

Before the suit was brought, appellees, as authorized taxing officials of the State, were asserting the right and had declared their determination to impose the tax upon all gross receipts of appellant and others similarly situated derived from sales in interstate and foreign commerce and upon all gross receipts derived from interest on tax-exempt bonds of municipal corporations of the State of Indiana, and to take all steps necessary to collect the same (R. 34-35).

An actual controversy existed between appellant in its own behalf and in behalf of other taxpayers similarly situated and the appellees; and it was necessary that the rights, status and legal relations of the parties in respect to the subject-matter of the suit be determined and declared by the court, and the parties were entitled to have their respective rights under the various provisions of the Gross Income Tax Act of 1933 declared by the court, pur-

suant to the provisions of the uniform declaratory judgments act of Indiana (R. 35, 16-17).

Under the statute, by construction of the state court, the tax is applied to the gross receipts* of appellant at the following rates: upon receipts from sales of products to ultimate users at the rate of one per cent (7 N. E. (2d) 943); upon receipts from sales of products to persons who resell at the rate of one-fourth of one per cent (7 N. E. (2d) 943); and upon receipts of interest from tax-exempt bonds at the rate of one per cent (R. 79).

Specification of Errors to be Urged

The errors of the court below will be urged as to both phases of the case as set forth in appellant's Assignment of Errors (R. 70-71), and may be summarized as follows:

First: That the Supreme Court of Indiana erred in holding that the Gross Income Tax Act of 1933 may be applied to gross receipts derived from interstate and foreign commerce without constituting an undue regulation of and burden upon such commerce, or an impost or duty upon exports without the consent of Congress, in violation of Article I, Section 8 and Section 10 of the Constitution of the United States.

Second: That the Supreme Court of Indiana erred in holding that the Gross Income Tax Act of 1933 may be applied to gross receipts of interest from tax-exempt bonds

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*Note.—In this brief, the terms "gross receipts" and "gross income" are used interchangeably. The 1933 statute is called a "Gross Income Tax Act," but under Section 1 (f), gross income is defined to be "gross receipts." The tax is levied upon "gross earnings" only of certain classes of taxpayers (Section 1 (g), but as to appellant and others similarly situated, it is laid on gross receipts (Regulation 6; R. 76).

of Indiana municipal corporations issued before the effective date of the Act without impairing the obligation of contracts in violation of Article I, Section 10 of the Constitution of the United States.

Summary of Argument

I

Burden on Interstate and Foreign Commerce

The Indiana Gross Income Tax Act of 1933 as construed and applied by the state Supreme Court imposes a tax upon the entire proceeds from sales by all manufacturers, wholesalers and merchants operating in the State, including proceeds from goods sold and shipped to points outside the State. The rate of tax is one per cent or one-fourth of one per cent of the gross receipts, depending on whether the sale is at wholesale or retail. The tax must be paid quarterly. This tax is in addition to all ad valorem property taxes as well as other excise taxes. The tax when laid upon gross receipts from interstate and foreign commerce amounts to a regulation of and a direct burden upon such commerce. The State exacts for its own use a certain percentage of the entire proceeds from all interstate and foreign commerce. The effect upon such commerce is not remote, but is direct and immediate. The burden so imposed must unavoidably be considered a regulation of and restraint upon such commerce in conflict with the Federal Constitution. It is immaterial what the nature of the tax is. Whether it is laid on the privilege of manufacturing, or the privilege of merchandising, or the right to receive gross income, or upon gross receipts as such, the result is the same. The effect is to impose a tax upon the privilege of engaging in interstate commerce, or upon such commerce itself, which the State may not do. The tax would be no less a burden on interstate commerce

even if it were of general application and non-discriminatory character. It is the sort of tax in all respects which this Court has consistently held to be in violation of the commerce clause in the line of decisions which are referred to later in this brief.

II

Impairment of Contract

Article I, Section 10 of the Constitution of the United States provides that no state shall pass any "law impairing the obligation of contracts."

On May 1, 1933, the Gross Income Tax Act of 1933 became effective. The Act levies a tax upon gross receipts from various sources. By Regulation No. 62 of the Department of Treasury (R. 92) and decision of the Supreme Court in this case (7 N. E. (2d) 943), the tax has been applied to all interest derived from municipal securities. Receipts of interest from bonds of Indiana municipal corporations issued prior to the effective date of the Act have been included in the class taxed, even though such bonds were issued under a statute expressly declaring them to be exempt from taxation (Ch. 191, Sec. 1 (twentieth), Indiana Acts 1923, p. 562), which it is conceded constitutes a contract with the bondholder (R. 29; 7 N. E. (2d) 944). Appellant is the owner of bonds of Indiana municipal corporations issued prior to the effective date of the Gross Income Tax Act under the statute declaring them to be tax exempt. Appellant contends that since the Act takes one per cent of all the interest received by the appellant from such tax-exempt securities, the securities themselves are taxed and the contract of exemption is impaired within the meaning of the Constitution of the United States. *Northwestern Mutual Life Insurance Co. v. Wisconsin*, 275 U. S. 136.

ARGUMENT

I

The Tax is Invalid as Applied to Gross Receipts from Interstate and Foreign Commerce

Appellant is engaged in the manufacture of certain products. It is also engaged in the merchandising of those products. There is no gain from manufacture alone. The products must be sold. Appellant's goods after manufacture are traded and exchanged for their equivalent in money. That is commerce.[1] By far the greater part of such goods are sold in other states and in foreign countries. That is interstate commerce. The statute in question here purports to impose a tax upon gross income received in the State of Indiana from all sources. As construed by the state Supreme Court, it requires a tax to be laid on all gross receipts of appellant and others similarly situated, including those derived from the sale of products in interstate and foreign commerce. Returns and payment must be made quarterly. This tax is in addition to the usual ad valorem property taxes, state and local. In computation of the tax, gross receipts from business done in interstate and foreign commerce are readily separable from gross receipts from business transacted within the State,[2] and the Gross Income Tax Division of the Depart-

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1.—*Brown v. Maryland,* 12 Wheat. 419, 446-447; *Welton v. Missouri,* 91 U. S. 275, 280; *Kidd v. Pearson,* 128 U. S. 1, 20-21; *Addyston Pipe & Steel Co. v. United States,* 175 U. S. 211, 241-242; *Adair v. United States,* 208 U. S. 161, 176-177; *Real Silk Hosiery Mills Inc. v. Portland,* 268 U. S. 325; *Carter v. Carter Coal Co.,* 298 U. S. 238, 297-298.

2.—*Ratterman v. Western Union Telegraph Co.,* 127 U. S. 411, 424, 427; *Bowman v. Continental Oil Co.,* 256 U. S. 642, 646-647.

ment of Treasury has recognized this by providing separate forms of returns (Reg. 193, R. 144-145, and Regulation 3801, Appendix B, Statement as to Jurisdiction).

A mercantile transaction in interstate commerce consists in (a) selling and shipping the goods, and (b) receiving the pay. The second is inseparable from the first. There could be no interstate commerce without payment for the goods sold and shipped. The very object of engaging in commerce is to receive pay for it.[3] So a tax upon the receipts from sales in interstate commerce is incontrovertibly a tax upon interstate commerce. It is a burden on interstate commerce, and the burden is direct. There can be no conception of anything in the nature of a tax that would be a more direct burden upon such commerce.

The theory of the tax is immaterial—whether conceived to be a tax upon gross receipts as such, or upon the right to take such receipts, or upon the actual taking of such receipts, or upon the privilege of manufacturing the goods, or upon the privilege of merchandising the goods, the effect is the same. The State exacts for itself a certain percentage out of every dollar received in payment for the goods sold and shipped. The amount of the tax fluctuates with the volume of receipts from such commerce, and is at all times directly related to it. The tax, being upon *gross receipts,* as distinguished from *net income,*[4] is upon the price and consideration received for the goods, is imposed directly on the commerce, and is a direct burden on the commerce itself. Whether the tax be considered as laid upon gross receipts or as laid on interstate commerce itself, no distinction can be discerned between the two. A tax on

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[3].—*Phila. & S. M. S. S. Co. v. Pennsylvania,* 122 U. S. 326, 337-338.

[4].—*United States Glue Co. v. Oak Creek,* 247 U. S. 321, 328-329.

gross income or receipts from interstate commerce is in truth a tax upon the engaging in interstate commerce. It cannot be otherwise. While a state may tax the privilege of engaging in local business, it may not tax the privilege of engaging in interstate commerce.[5] Taxation being one of the forms of regulation under Article I, Section 8 of the Federal Constitution, any tax directly laid upon such privilege is void even in the absence of legislation by Congress or a finding of prejudice or discrimination.[6] The selling and shipping of merchandise from Indiana into other states and foreign countries being interstate or foreign commerce, the State "is not at liberty to tax the privilege of doing it by exacting in return therefor a percentage of the gross receipts. Decisions to that effect are many and controlling."[7]

As applied by the Court below to gross receipts from interstate commerce, the tax here involved is of a type which this Court in a line of decisions unbroken for more than half a century has held to be an unconstitutional burden on interstate commerce.

> *Phila. & S. M. S. S. Co. v. Pennsylvania,* 122 U. S. 326;
> *Leloup v. Port of Mobile,* 127 U. S. 640;
> *Galveston, H. & S. A. R. Co. v. Texas,* 210 U. S. 217;
> *Meyer v. Wells, Fargo & Co.,* 223 U. S. 298;
> *Crew Levick Co. v. Pennsylvania,* 245 U. S. 292;
> *Cudahy Packing Co. v. Minnesota,* 246 U. S. 450;

5.—*East Ohio Gas Co. v. Tax Commission,* 283 U. S. 465, 470; *Cooney v. Mountain States Tel. & Tel. Co.,* 294 U. S. 384, 392; *Pacific Tel. & Tel. Co. v. Tax Commission,* 297 U. S. 403, 412-413.

6.—*Pacific Tel & Tel. Co. v. Tax Commission,* 297 U. S. 403, 412-413.

7.—*Puget Sound Stevedoring Co. v. Tax Commission,* 82 L. Ed. advance paging 66.

United States Glue Co. v. Oak Creek, 247 U. S. 321;
Sprout v. South Bend, 277 U. S. 163, 171;
New Jersey Bell Tel. Co. v. State Board, 280 U. S. 338, 349;
Cooney v. Mountain States Tel. & Tel. Co., 294 U. S. 384, 392-393;
Matson Navigation Co. v. State Board, 297 U. S. 441, 444;
Pacific Tel. & Tel. Co. v. Tax Commission, 297 U. S. 403, 412-413;
Fisher's Blend Station v. Tax Commission, 297 U. S. 650, 655-656;
Puget Sound Stevedoring Co. v. Tax Commission, 82 L. Ed. advance paging 64.
(See also, *Dissenting Opinion* by Treanor, J., in the instant case, 7 N. E. (2d) 941, 951; Statement as to Jurisdiction, p, 42; and R. 61.)

In full accord with the decisions of this Court is also a prior decision of the Indiana Supreme Court. There in a carefully considered opinion, after referring to and discussing a number of the earlier decisions of this Court, it was said:

> "Under the law, as authoritatively declared by the court of last resort, no tax, in any form, or for any purpose, can be laid upon interstate commerce. The matter of interstate commerce is a national matter, with which States can in no wise interfere. The jurisdiction of the Federal government absolutely excludes the States from directly or indirectly hampering or taxing commerce between the States.
>
> The claim of the State is also put upon the ground that the appellee can be compelled to pay a tax upon its gross earnings for the privilige of doing a local business in Indiana. This position is untenable. In no

event can a corporation, engaged in the business of interstate commerce, be taxed for the privilege of doing business in this, or any other, State. This principle early found a place in our jurisprudence. . . . Indeed, one of the great causes which led to the adoption of our Federal Constitution was the evil produced by the levying of tribute, in the form of taxes, upon the commerce between the States by some of the States under the Articles of Confederation. . . ."

State, ex rel. v. Woodruff Sleeping and Parlor Coach Co., 114 Ind. 155, 159.

The authority of the above decision of the state Supreme Court is fully recognized by the Department of Treasury in its administrative practice touching transportation and communication agencies. The statute nowhere makes any exception as to gross receipts received by such agencies from their business in interstate commerce. No distinction whatever is made between the taxability of gross receipts derived from the sale of goods in interstate commerce, and gross receipts derived from the service of carrying such goods to destination. The taxing officials, however, have in Regulation 140[8] exempted from the tax all gross receipts from services rendered in interstate commerce by any of the transportation or communication agencies. The selling and shipment of goods is commerce. If, as the Indiana officials have recognized, it is not lawful to lay a tax upon a mere instrumentality of interstate commerce, how can it be lawful *to lay a tax upon the commerce itself?*

[8].—"Reg. 140. The gross receipts derived by railroads, interurbans, pipe line, bus and truck lines from carrying charges of passengers, including Pullman service on sleeping and dining cars, freight and telephone or telegraph messages originating in the State of Indiana, the destination of which is outside of the State of Indiana on a continuous conveyance or which originated outside the State of Indiana and terminated therein, will not be included in gross income tax returns." (R. 121.)

The telegraph or telephone service used in negotiating sales, and the service of carrying the goods to their destination in other states and foreign countries, certainly have no sounder basis for exemption from the tax than have the proceeds derived from the sale and shipment of the goods themselves. The tax burden upon the latter is as direct as upon the former.

Clearly the Act makes no distinction. (Sec. 6(a) provides:

> "There shall be excepted from the gross income taxable under this Act: (a) So much of such gross income as is derived from business conducted in commerce between this state and other states of the United States, or between this state and foreign countries, to the extent to which the State of Indiana is prohibited from taxing under the constitution of the United States of America."

A statement of the principle controlling taxation of gross receipts, as developed by this Court in preceding decisions and many times since repeated in almost identical language, is found in the *Minnesota Rate Cases* as follows:

> "The principle which determines this classification underlies the doctrine that the states cannot, under any guise, impose direct burdens upon interstate commerce. For this is but to hold that the states are not permitted directly to regulate or restrain that which, from its nature, should be under control of the one authority, and be free from restriction, save as it is governed in the manner that the national legislature constitutionally ordains.
>
> Thus, the states cannot tax interstate commerce, either by laying the tax upon the business which constitutes such commerce, or the privilege of engaging in it, or *upon the receipts*,* as such, derived from it

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*Note.—All italics used in quotations in this brief are ours unless otherwise stated.

(citing many cases); or upon persons or property in transit in interstate commerce (citing cases)."

Simpson v. Shepard, 230 U. S. 352, 400.

A recent statement of the principle is as follows:

"... Persons have a constitutional right to engage in interstate commerce free from burdens imposed by a state tax upon the business which constitutes such commerce or the privilege of engaging in it or the receipts as such derived from it. *Minnesota Rate Cases (Simpson v. Shepard)* 230 U. S. 352, 400. Interstate commerce is not an abstraction; it connotes the transactions of those engaged in it and they enjoy the described immunity in their own right."

James v. Dravo Contracting Co., 82 L. Ed. advance paging 125, 138.

Definition of the Tax

In determining the Federal questions presented on this appeal, characterization of the tax is of no material consequence. Its name, definition, or any precise concept as to what it is laid upon, is unimportant. The sole question is whether the tax imposes a burden on interstate commerce that is not permitted by the Federal Constitution. This question can be answered only by reference to decisions of this Court and by the methods of construction traditionally used by it.[*]

However, it may throw light upon the weight to be given to the discussion of the court below to observe that it has had considerable difficulty in deciding to its satisfaction

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*.—*Crew Levick Co. v. Pennsylvania,* 245 U. S. 292, 294; *Macallen Co. v. Massachusetts,* 279 U. S. 620, 625; *Educational Films Corp. v. Ward,* 282 U. S. 379, 387; *Lawrence v. Tax Commission,* 286 U. S. 276, 280; *Gregg Dyeing Co. v. Query,* 286 U. S. 472, 476; *Senior v. Braden,* 295 U. S. 422, 429.

exactly what the nature of the tax is. In *Miles, et al. v. Department of Treasury* (opinion filed January 29, 1935), 193 N. E. 855, 861,[10] where the state Supreme Court first construed the tax, it said:

> "We conclude that the tax in question is an excise levied upon those domiciled in the State, upon the basis of the *privilege of domicile,* and that the burden may reasonably be measured by the amount of income."

On November 21, 1935, the state court filed an opinion "superseding former opinion," 209 Ind. 172, 188, in which the above language was expanded:

> "We conclude that the tax in question is an excise, levied upon those domiciled within the State or who derived income from sources within the State, upon the basis of the *privilege of domicile* or *the privilege of transacting business* within the State, and that the burden may reasonably be measured by the amount of income. The reasoning which justifies a tax upon the basis of domicile as readily supports and justifies a tax upon the basis of the right to receive income within, or transact business under the protection of the State."

And, in this case, 7 N. E. (2d) 944 (April 30, 1937), the court said:

> "The statute here under consideration levies a tax upon all who are domiciled within the State, based upon the *privilege of domicile,* and *transacting business,* and *receiving gross income,* within the State, and measured by the amount of gross income."

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[10].—The *Miles case* was appealed to this Court and dismissed on motion of the Attorney General on the ground that it was moot. (298 U. S. 640.) The record in the case will show, if it is complete, that the case was moot when the state Supreme Court decided it. A brief *amicus curiæ* was submitted to the state court showing its moot character and suggesting that it be dismissed by that court without decision.

The Attorney General argued in the state court and may argue here that a fourth privilege is taxed, namely, *the privilege of manufacturing,* "measured by the value of the goods manufactured" (R. 40-41).

The above definitions are of little value in determining the validity of the tax as applied to interstate commerce. The tax is not explained by calling it a tax on domicile, for it is also imposed upon foreign corporations and non-residents who receive income in the State or who receive income outside the State which is derived from sources within the State (Sec. 2, Ch. 50, Acts 1933; Reg. 2; R. 75). Neither is it explained by calling it a tax upon the privilege of transacting business, for, in many instances, it taxes where there is no business. Receipts received from any source whatever are taxed (Sec. 3 (f), Ch. 50, Acts 1933; Reg. 17; R. 78). The tax can logically be explained only *as a tax on gross receipts, which is exactly what the Act says it is, definitely and without ambiguity.* Further, examination of the Regulations under the Act reveals clearly that the administrative officers view it and apply it simply as a gross receipts tax.[11]

The Legislature made plain its intention to make gross receipts the subject of the tax by leaving out of the Act all language that would indicate that a privilege or occupation is taxed. The law from which the Act was copied, namely, the Mississippi Act of 1932, was plainly couched in the language of an occupation or privilege tax (as most

[11].—Title of Act, "imposing a tax upon the receipt of gross income * * *"; Sec. 2, "levied *upon* the entire *gross income* * * *"; also, Sec. 3, (a)-(f); Sec. 6, (a)-(e); "excepted from the *gross income taxable* * * *"; Sec. 9, "not liable for a tax *upon his entire gross income"*; Regulations, Art. 2, "The gross income tax act of 1933 *is primarily* and *in effect* a *gross receipts tax* * * *"; Reg. 16, "Tax shall apply to and shall be levied and collected *upon all gross income* * * *"; Reg. 21, *"Gross income* derived from sales *is taxable* * * *"; (Rec. 77-79).

other state excise taxes are), but all such language was carefully deleted by the Indiana Legislature.[12]

If the tax is an occupation tax, then as applied to appellant it is a tax upon the privilege of merchandising—the selling of its products. Gross receipts do not arise from manufacturing. They arise from the sale of the goods after the process of manufacture is complete. The receipts obtained—which are simply payment-money for the goods—include not alone the cost of manufacture, but also the direct and overhead costs of selling and usually the cost of shipment. The tax is directly related to the operation of selling and receiving money, as it is a tax upon the receipt of money. This is recognized by the state court in construing the statute on another point. Appellant contended below that as to all of its gross receipts, the tax should be computed at the rate of one-fourth of one per cent as a manufacturer, as stated in the Act, instead of at the rate of one per cent as a retailer. (Secs. 3 (a) and 3 (c), Ch. 50, Acts 1933; Reg. 47; R. 87). But the court held that the fact of manufacturing did not control the rate, that the character of the sale controlled it; and that when appellant sold, as would a wholesaler, to dealers or distributors for resale, the tax rate was one-fourth of one per cent, but when it sold, like a retailer, to an ultimate user or consumer, it must pay at the rate of one per cent; and said: "*The rate does not depend upon the business in*

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[12].—Title of the Mississippi Act was: "An Act to provide for the raising of additional public revenue by imposing a tax upon the privilege of engaging in certain businesses in Mississippi, to provide for the ascertainment, assessment, etc." Ch. 119, Acts of Mississippi 1932. Title of the Indiana Act is: "An Act to provide for the raising of public revenue by imposing a tax upon the receipt of gross income, to provide for the ascertainment, assessment, etc." The Mississippi Act contained the word "privilege" twenty times and in each instance it was deleted in the Indiana law.

which the taxpayer is primarily engaged, but upon the activity from which each item of his gross income is received." (7 N. E. (2d) 941, 943; Statement as to Jurisdiction, p. 26; R. 46).

Thus, by the state court's holding, the tax is related to the activity of selling, and not to the activity of manufacturing. If the tax is an occupation tax at all, it is upon the occupation of selling merchandise, as in the *Crew Levick Case.* It is in fact neither. It is what the statute and the regulations call it—a tax upon gross receipts. And, "if the tax is what it calls itself, it is bad.'"[13] If it be deemed a tax upon the privilege of receiving gross receipts, the result is precisely the same. In either case, it is laid upon commerce itself, for selling is commerce and taking payment for things sold is commerce; and as to appellant's transactions in other states and foreign countries, it is a tax upon such commerce.

Whether the tax is laid directly upon gross receipts, or whether gross receipts are used merely as a convenient measure in computing the tax, as applied to gross receipts in interstate commerce the tax is invalid. Gross receipts cannot be a proper measure of any of the privileges included in the definition of the tax by the state court when considered in relation to interstate commerce. They cannot be a proper measure of the privilege of domicile, or of transacting business in interstate commerce, or of receiving dollars for goods sold in interstate commerce.

In *Galveston, H. & S. A. R. Co. v. Texas*, 210 U. S. 217, 227, the Court had before it a statute where gross receipts were the measure of the tax, and the Court said:

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[13].—*Meyer v. Wells, Fargo & Co.*, 223 U. S. 298, 300; also, *East Ohio Gas Co. v. Tax Commission*, 283 U. S. 465, 470.

"We are of opinion that the statute levying this tax *does amount to an attempt to regulate commerce among the states.* The distinction between a tax 'equal to' one per cent of gross receipts, and a tax of one per cent of the same, seems to us nothing, except where the former phrase is the index of an actual attempt to reach the property and to let the interstate traffic and the receipts from it alone. We find no such attempt or anything to qualify the plain inference from the statute, taken by itself. On the contrary, we rather infer from the judgment of the state court and from the argument on behalf of the state that another tax on the property of the railroad is upon a valuation of that property, taken as a going concern. This is *merely an effort to reach the gross receipts*, not even disguised by the name of an occupation tax, and in no way helped by the words 'equal to.' " (p. 227.)

So, whether the tax is laid upon the privilege of merchandising, as the state court apparently believes, or upon the privilege of receiving the proceeds of the merchandising, or upon the proceeds themselves, in any case, when applied to appellant's sales in interstate and foreign commerce, it is repugnant to Sections 8 and 10, Article I of the Federal Constitution.[14]

Nature of the Tax

The court below, in holding that the State may lawfully impose the tax upon gross receipts from interstate commerce, takes the position that the tax is general in form and application and does not in any way discriminate against interstate commerce, and in these respects differs from other state taxes on gross income which this Court has held invalid, including those considered in *Crew Levick*

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[14].—See cases cited on pages 10-11, *supra.*

Co. v. Pennsylvania, 245 U. S. 292, and the decisions preceding and following it.

In the first place, it is to be pointed out that the generality of such a tax in the sense used by the state court has never by this Court been considered a factor in determining whether it constitutes a direct and undue burden upon interstate commerce. The courts have always insisted that a tax must be general, that is, it must treat alike all within the class taxed; otherwise the tax is invalid by lack of due process of law or lack of equal protection of the law. This is a fundamental requirement in all taxes. But a tax may be entirely "general" in this respect and still be an illegal burden on interstate commerce, as both Federal and state courts have held in innumerable cases.

All through the opinion of the court below there is much stress laid on the term "general." Frequently it is used as practically synonymous with "universal," or as applying to every possible taxpayer in the State. In tax phraseology, the term "general" has never been given any such significance. It has not been considered that for a tax to be "general" it must be applicable to every possible taxpayer in the taxed area. In fact, there never has been such a tax. Even the ad valorem property tax has exceptions, and poll taxes, the most general type of all, are imposed only on persons between a minimum and maximum age.

Viewed in the light of the accepted meaning of the word "general" as used in tax terminology, the gross income tax of Indiana is not more general than other taxes which this Court has held to be invalid when applied to interstate and foreign commerce.

The gross income tax in question is *not* a general tax in the sense that it taxes every person or the entire gross in-

come of every person who receives gross income. Some of the more important exclusions, deductions and exemptions are the following:

There is the blanket exemption of all persons receiving less than One Thousand Dollars gross income per year. Among other exemptions are the following: Insurance companies which pay the State a tax of more than one per cent on premiums; non-profit labor organizations; non-profit agricultural organizations; non-profit horticultural societies; cemetery associations; fraternal societies operating for members; religious, charitable, scientific and fraternal organizations; business leagues; chamber of commerce groups; boards of trade; and civic leagues operated for benefit of social welfare. (Sec. 7.)* As to certain classes, gross *earnings* and *not* gross *receipts* are taxable. Among others, the following pay tax only upon their gross earnings and *not* their gross receipts: Banks, trust companies, building and loan associations, brokers, finance companies, dealers in commercial paper, and persons engaged in lending money or credit (Sec. 1 (g)). Also, domestic insurance carriers do not pay upon the portion of their income which becomes a reserve for the policy liability (Sec. 1 (h)). All persons are allowed certain deductions from gross income, including among others: Receipt of outright gifts (whether cash or property) (Reg. 70, R. 95), and pensions (Reg. 71, R. 96). Certain exclusions from gross income are allowed to all persons, including among others, the following: Receipts from insurance by reason of death of insured (Sec. 6 (d)); receipts from any insurance to amount of premiums paid (Sec. 6 (e));

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*Note.—Citations are to sections in Chap. 50, Acts 1933, found in the Appendix hereto, and to Regulations promulgated by Department of Treasury, Gross Income Tax Division, found in the Record.

salary from Federal Government or its agencies (Sec. 6 (a)); receipts from sale and interest on bonds of United States Government or its agencies (Sec. 6 (a)); receipts from maturities of Indiana municipal bonds (Reg. 62, R. 92); receipts from sales to United States Government or its agencies (Sec. 6 (c)); receipts on maturity of bonds or matured stock (Reg. 62, 103, R. 92, 111); money received as agent (Reg. 65, R. 93).

The reasonableness of these exemptions and exclusions is not here in question. The point is that *this tax is no more general,* in the sense of being universal in its application, *than other taxes which this Court has held to be unconstitutional burdens on interstate commerce.*

The case of *Crew Levick Co. v. Pennsylvania,* supra, which is closely analogous to the instant case, provides a fair example. In that case foreign commerce was involved just as in this case, and both Sections 8 and 10 of Article I of the United States Constitution were before the Court as in this case.

The *Crew Levick Case* (245 U. S. 292, note) arose on a Pennsylvania statute which provided:

> "That . . . each retail vendor of or retail dealer in goods, wares and merchandise shall pay an annual mercantile license tax of \$2, and all persons so engaged shall pay one mill additional on each dollar of the whole volume, gross, or business transacted annually. Each wholesale vendor of or wholesale dealer in goods, wares and merchandise shall pay an annual mercantile license tax of \$3, and all persons so engaged shall pay one-half mill additional on each dollar of the whole volume, gross, of business transacted annually."

Manifestly this tax was general to an unusual degree. The subject of the tax was the activity of retailing or

wholesaling goods, wares and merchandise of every sort and kind. There were no exemptions or exclusions. It applied from the lowest to the highest. It taxed all alike, from the peanut vendor on the street to the manufacturer with an investment of millions. And there was no discrimination in the tax. It applied to all dealings in all kinds of goods, wares and merchandise, whether such dealings were local and intrastate or whether they were interstate and foreign. So the fact is that the Pennsylvania tax held invalid by this Court in the *Crew Levick Case,* was at least as general in its application as the gross income tax of Indiana now under consideration.

Concerning this general and non-discriminatory tax of Pennsylvania, this Court said:

> "The tax now under consideration, so far as it is challenged, fully responds to these tests. It bears no semblance of a property tax, or a franchise tax in the proper sense; nor is it an occupation tax except as it is imposed upon the very carrying on of the business of exporting merchandise. It operates to lay *a direct burden* upon every transaction in commerce *by withholding,* for the use of the State, a *part of every dollar received in such transactions.* That it applies to internal as well as to foreign commerce cannot save it; for, as was said in *State Freight Tax Case,* 15 Wall. 232, 277, 21 L. ed. 146, 162: 'The State may tax its internal commerce, but if an Act to tax interstate or foreign commerce is unconstitutional, *it is not cured by including in its provisions subjects within the domain of the state.*' That portion of the tax which is measured by the receipts from foreign commerce necessarily varies in proportion to the volume of that commerce, and hence is a direct burden upon it."
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> *Crew Levick Co. v. Pennsylvania,* 245 U. S. 292, 297-298.

The occupation tax considered by this Court in *Fisher's Blend Station* and *Puget Sound Stevedoring Co. Cases, supra,* was also a general tax. Instances of taxes of broad and non-discriminatory application to gross receipts are to be found in many other states where they are not enforced against receipts from interstate commerce because of the recognized illegality thereof under the Federal commerce clause. See p. 40, *infra,* and note.

Any tax which directly burdens interstate commerce is invalid regardless of whether it discriminates against or in favor of such commerce. This Court, in many instances where the tax was non-discriminatory and of general application within the class chosen for taxation, has held a state tax to be invalid as applied to interstate and foreign commerce.

> "The state may tax its internal commerce; but if an act to tax interstate or foreign commerce is unconstitutional, *it is not cured* by including in its provisions subjects within the domain of the state."
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> *Phila. & Reading R. Co. v. Pennsylvania,* 82 U. S. (15 Wall.) 232, 277.

> "It is strongly urged, as if it were a material point in the case, that no discrimination is made between the domestic and foreign drummers—those of Tennessee and those of other states; that all are taxed alike. *But that does not meet the difficulty.* Interstate commerce cannot be taxed at all, even though the same amount of tax should be laid on domestic commerce, or that which is carried on solely within the state."
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> *Robbins v. Taxing District,* 120 U. S. 489, 497.

After referring to the decision and the language above quoted, this Court in the following case said:

> "This last observation meets the argument that might be made in the present case; namely, that the law is general in its terms, and taxes receipts for all trans-

portation alike, *making no discrimination* against receipts for interstate or foreign transportation, and hence cannot be regarded as a special tax on the latter. The decision in the case cited shows that this does not relieve the tax from its objectionable character.

Phila. & S. M. S. S. Co. v. Pennsylvania, 122 U. S. 326, 340.

"The tax affects the *whole business without discrimination*. There are sufficient modes in which the internal business, if not already taxed in some other way, may be subjected to taxation, without the imposition of a tax which covers the entire operations of the Company."

Leloup v. Port of Mobile, 127 U. S. 640, 647.

"Of course, it does not matter that the plaintiffs in error are domestic corporations, or *that the tax embraces indiscriminately gross receipts from commerce within as well as outside of the State.*"

Galveston, H. & S. A. R. Co. v. Texas, 210 U. S. 217, 228.

"The fact that the law under which the tax was imposed was a *general* law, *touching all sales of the class*, and not aimed specially at exports, would not help the defendant if, in this case, the tax was 'laid on articles exported from any state,' because that is forbidden in terms by the Constitution."

A. G. Spalding & Bros. v. Edwards, 262 U. S. 66, 69.

"So, too, a tax upon the gross receipts from interstate transportation or transmission, *whether receipts from intrastate transportation or transmission are equally taxed or not*, is an unlawful tax because a direct burden upon interstate commerce."

Sonneborn Bros. v. Keeling, 262 U. S. 506, 515.

"The fact that a portion of a business is intrastate and therefore taxable does not justify a tax either

upon the interstate business or upon the whole business without discrimination . . . There are 'sufficient modes' in which the local business may be taxed without the imposition of a tax 'which covers the entire operations.' (Citing cases) *Where the tax is exacted from one doing both an interstate and intrastate business, it must appear that it is imposed solely on account of the latter; that the amount exacted is not increased because of the interstate business done; that one engaged exclusively in interstate commerce would not be subject to the tax; . . .*"

Cooney v. Mountain States Tel. & Tel. Co., 294 U. S. 384, 392-393.

The court below suggests that the tax on manufacturers and wholesalers seems to discriminate in their favor. This is on the assumption that the greater part of all goods sold in interstate commerce is to distributors or dealers for resale and therefore are taxed at the lower rate. This assumption is unsound. It is well known that much the larger part of capital goods is sold to ultimate users and consumers, and that a substantial part of consumers goods is so sold. Gross receipts from such sales are taxed at the higher rate of one per cent.

But in any case, whether manufacturers pay chiefly at the higher or the lower rate can have no bearing on the legality of the tax. The difference is wholly adventitious. It does not rest upon the character of the tax; and if a difference in rate is to make the distinction between a legal and an illegal burden, the problem then will be as to how great a difference in rate will be necessary in order to make one tax valid and another invalid. It is obvious that the legality of a burden on interstate commerce can not depend upon the size of that burden. Once the validity of such a tax is recognized, the courts can place no limit upon

the amount, and legislatures will be free to impose a tax upon gross receipts from interstate commerce that may destroy the commerce.

> "Once the lawfulness of the method of levying the tax is affirmed, the judicial function ceases. He deludes himself by a false hope who supposes that if this court shall at some future time conclude the burden of the exaction has become inordinately oppressive, it can interdict the tax."
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> *Stewart Dry Goods Co. v. Lewis*, 294 U. S. 550, 563.

It is clear on reason that a state tax that directly regulates, restricts or burdens commercial transactions in interstate commerce cannot be relieved of its constitutional infirmity because it is applied in the same manner to like transactions within the borders of the state. The instant case well illustrates this principle.

The effect of the tax in question is not remote or indirect. It is immediate and direct. It takes hold of every dollar that results from commerce and extracts from it a percentage toll. Not a dollar from any mercantile transaction escapes it. This tribute the State with perfect right may exact from its domestic transactions: That is within its sole jurisdiction, but taxation of interstate commerce is not within its jurisdiction. The Constitution does not say that the power of Congress to regulate commerce with foreign nations and among the several states shall exist only where a state fails to exercise its own power to regulate commerce within its borders. There is no indication in the commerce clause that its authority over interstate and foreign commerce should be limited by anything the state might do with respect to its own commerce. There is no power reserved to the state to tax interstate commerce,

and there is no restriction on Congress as to regulation of commerce that is interstate.

So, the fact that the state sees fit to exercise its taxing functions as to commercial transactions within its borders, or as to the receipts derived from such transactions, does not in any way create for it an authority to do the same thing as to transactions within the realm of interstate commerce. Taxing the privilege of engaging in domestic commerce cannot give rise to an authority it otherwise did not have to tax the privilege of engaging in interstate commerce. The generality of the tax imposed by the State cannot take off the constitutional limitations on the power of the State. Thus, it is not necessary that regulation be directed at interstate commerce alone, or discriminate against interstate commerce, in order to come within the inhibition of the Constitution. The commerce clause says nothing of that sort, and the imposition of a burdensome tax upon all commerce does not lessen its objectionableness as to the type of commerce protected by such clause. This, we think, is the conclusion that must be drawn from the many decisions of this Court upon the subject.

The burdensome effect which this gross receipts tax will have upon interstate commerce is further illustrated by the system of taxation now developing. Many states now have "use" or "compensating" taxes which are levied upon the use of goods within the state. They are complementary to existing sales taxes that now are applied only to intrastate sales. The use tax is always levied at the same rate and is equal in amount to the sales tax. The use tax laws permit the amount of any sales tax *paid within the state* to

be credited against the use tax.[15] This cancels the use tax where the sales tax is paid within the state. Except in few instances, credit is not allowed for any sales or other excise tax collected by another state. Obviously, where the use tax is established, the interstate seller must either pay the tax himself or increase his price to allow for the use tax payable in the state to which the goods are shipped.[16]

If a gross receipts tax, as here in question, or a sales tax, be laid upon the seller in the state of origin, the practical result is that a burden will fall doubly upon interstate sales, and singly upon intrastate sales. For example: assume appellant has a competitor in the State of Ohio, manufacturing the same line of products. Ohio has in force a three per cent use tax. Appellant's products sold in the State of Ohio must there submit to the use tax. Its Ohio competitor pays only the three per cent sales tax, which is credited against the use tax. If appellant in addition to paying the

[15].—Laws of Alabama 1936, Act 126, Sec. 2(d), 2% tax; Laws of Arkansas 1937, Act 154, Sec. 4 (F), 2% tax; Laws of California, Deering's Supp. 1935, Sec. 4(a), p. 2020, 3% tax; Laws of Colorado 1936, Chapter 11, Sec. 2(a), 2% tax; Laws of Iowa 1937, S. F. No. 317, Sec. 3(1), 2% tax; Local Laws New York City 1937, No. 21, Sec. 2(c), 2% tax; Laws of Ohio, General Code, Sec. 5546-26(1), 3% tax; Laws of Wyoming 1937, Chapter 118, Sec. 4 (a), 2% tax. *Cf. Henneford v. Silas Mason Co.*, 300 U. S. 577, 587.

The laws of the following States still contain an exemption from the use tax where a sales tax has been paid in the State or ***in any other State***:

Laws of Kansas 1937, H. B. No. 619, Sec. 5, 2% tax; Laws of Michigan 1937, H. B. 317, Sec. 4(f); Laws of Oklahoma 1937, H. B. 589, Sec. 5(c), 2% tax; Laws of Utah 1937, Ch. 114, Sec. 4(d), 2% tax.

[16].—Some of the use statutes provide that the seller shall collect the tax. Laws of California, Deering's Supp. 1935, Sec. 6, p. 2021; Laws of Iowa 1937, S. F. 317, Sec. 5(2); Laws of Michigan 1937, Act 94, Sec. 5; Laws of Ohio, General Code, Sec. 5546-28 (Jan. 1938 Supp.); Laws of Utah 1937, Ch. 114, Sec. 6; Laws of Wyoming 1937, Ch. 118, Sec. 6.

three per cent use tax in Ohio (or increasing its price three per cent, or collecting from the purchaser) is compelled to pay a gross receipts tax of one per cent in the State of Indiana, it is plain that such sales in interstate commerce must bear a burden of one per cent which the competitor doing intrastate business in Ohio does not bear. Free intercourse between the states will be seriously impeded if a tax on gross receipts can be applied in the state of origin and a use tax applied in the state of destination. With the rapid spread of the sales tax and its complement the use tax as a method of raising revenue, it is safe to say that soon the use tax in the state of destination in conjunction with a gross receipts tax or a sales tax in the state of origin would impose a double burden on interstate commerce which intrastate commerce would not bear.

The Tax is Not in Lieu of Property Taxes

The court below implies that the gross income tax is in lieu of other taxes and therefore can be sustained upon the theory that a tax "*in lieu of property taxes,*" if reasonable in amount, may be measured by gross receipts. This argument must fall with the premise on which it is based. The gross income tax is not in lieu of property taxes. Appellant (R. 25) and all other taxpayers continue to pay the regular property taxes, and the assessed valuation of their property for such purpose is established in the usual manner. The tax may in some counties reduce property taxes, in others, not; but all state excises imposed for revenue are intended to, and actually do, relieve and reduce property taxes to some extent. The "in lieu" tax theory relates only to taxes which are substitutes for property taxes.[17] This Court has held that a state in taxing property (usually

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17.—*Leloup v. Port of Mobile,* 127 U. S. 640, 645, 646; *Galveston, H. & S. A. R. Co. v. Texas,* 210 U. S. 217, 226-227.

of a foreign corporation that is a carrier) within its boundaries is not limited to the mere cash value of the tangible property, but may determine the value of such property on the basis that it is part of a going concern transacting interstate as well as intrastate business; but the foundation of all such taxes is that the tax levied *is in lieu of all other property taxes.* The state court, in its opinion in this case, endeavors to extend the "in lieu" theory by a statement that consideration must be given to other acts passed at the same session of the Legislature. This Court has had before it like situations where the same question was raised. In the case of *Meyer v. Wells, Fargo & Co., supra,* pp. 300-301, the Court said:

> "*It was argued in some detail that taking into account the rest of the act and other statutes passed later at the same session, this really was a property tax.* But the scope and purport of the act, so far as it affects express companies, are too obvious to admit such a view. *The tax is in addition to the taxes levied and collected upon an ad valorem basis . . .*"[18]

The distinction is also emphasized by writers of recognized standing. The reputed author of the Indiana Gross Income Tax Act himself has said:

> " . . . there is now no doubt of the invalidity of a state tax upon gross income derived from foreign or interstate commerce (*Meyer v. Wells, Fargo & Co.,* 223 U. S. 298 (1912); *Crew Levick Co. v. Pennsylvania,* 245 U. S. 292 (1917); *Galveston, etc., Ry. v. Davidson,* 93 S. W. 436 (Tex. Civ. App. 1906); *State Tax on Gross Receipts,* 15 Wall. 284 (U. S. 1872) must be deemed to be overruled, so far as it decides to the contrary),

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[18].—See, also, *United States Express Co. v. Minnesota,* 223 U. S. 335, 346, 347-348; *Cudahy Packing Co. v. Minnesota,* 246 U. S. 450, 454, 456.

although a state gross income tax limited to income from intra-state commerce clearly is not an offender. *Ohio Tax Cases,* 232 U. S. 576 (1914). *The only exception to this rule of invalidity is in the situation where a gross income tax is laid in lieu of one upon the property of a carrier; in such case the impost is essentially a property tax. Postal Tel. Co. v. Adams,* 155 U. S. 688 (1895); *State v. United States Express Co.,* 114 Minn. 346, 131 N. W. 489 (1911), aff'd; 223 U. S. 335 (1912). Even a tax upon gross earnings from interstate or foreign commerce seems also to be unconstitutional. *State v. Wells, Fargo & Co.,* 146 Minn. 444, 179 N. W. 221 (1920). See also *McHenry v. Alford,* 168 U. S. 651 (1898)."

Robert C. Brown, Constitutional Limitations on Progressive Taxation of Gross Income (1937, Iowa Law Review, Volume 22, pages 250-251).

Another writer has said:

"There is no dispute that gross receipts from interstate commerce are not taxable directly as such."

"The Court is satisfied when the state shows that the income is taken as a fair measure of the value of the property assessed for taxation, or *when a tax on income is in substitution for a property tax.*"

Indirect Encroachment on ~~Federal~~ Authority by Taxing Power of the State. Thomas Reed Powell, 32 Harvard Law Review, 377, 398.

In view of the state court's holding that the gross income tax is an excise tax, not a property tax (*Miles v. Department of Treasury,* 209 Ind. 172, 188), and the fact that the tax is levied in addition to all other taxes of every character, there is left no ground for the contention that the tax is in lieu of property taxes.

Cases Cited by the State Court

The case chiefly relied upon by the state court is *American Manufacturing Co. v. St. Louis,* 250 U. S. 459. This Court there held valid a license tax upon manufacturing measured by the value of the goods manufactured. In that case, the Court was careful to point out that the tax was payable only as to products actually manufactured in St. Louis and that the tax was measured by the value of the goods manufactured regardless of where sold. The Court said:

> "No tax has been or is to be imposed upon any sales of goods by plaintiff in error *except goods manufactured by it in St. Louis* under a license conditioned for the payment of a tax upon the amount of the sales when the goods should come to be sold." (250 U. S. 463.)

This Court, in stating the facts of the case, also said that the amount of the tax "is ascertained by and proportioned to the amount of sales of the manufactured goods whether sold within or without the State, and whether in domestic or interstate commerce." (250 U. S. 460.)

The theory of the *American Manufacturing Case* cannot be applied to the tax here for three reasons: (1) the tax is not laid on the privilege of manufacturing; (2) the tax, even if it were on the privilege of manufacturing, is not measured by the value of *all* goods manufactured; and (3) the tax is not limited to the value of the goods manufactured.

The discussion on the character of the tax at pages 16-19, above, relates to the first distinction and is not repeated here. The tax is not levied upon the privilege of manufacturing, and the state court has never stated that it is levied upon such privilege. It must be noted that the tax is upon the "entire" gross receipts of appellant. The

tax applies to appellant's receipts from investments, from the sale of goods other than its own products which it may purchase and resell, and to receipts from any source whatsoever. The tax is expressly stated by the statute and the Regulations under which it is administered to be "upon gross receipts," and in the case of appellant and others in like situation, it is a tax upon gross receipts from sales to customers located in other states and in foreign countries, and hence is a tax either upon the privilege of engaging in interstate and foreign commerce or upon the privilege of receiving payment for goods sold in interstate and foreign commerce.

As to both first and second distinctions, *supra,* the tax in this case, unlike the tax in *American Manufacturing Co. Case,* is not imposed upon the value of *all* goods manufactured in the State, nor upon gross receipts from the sale of *all* goods manufactured in the State. Under Regulation 191 (R. 143), promulgated July 31, 1934, the taxpayer was given the right to defer the reporting of receipts derived from activities carried on at a business situs outside the State of Indiana. By Regulation 193 (4) (R. 146), promulgated December 31, 1935, which revoked Regulation 191, such receipts of the taxpayer were designated as non-taxable receipts. (Cf. Sec. 2, Ch. 50, Acts 1933, which provides for the imposition of the tax upon both residents and non-residents who *derive income from sources within the State.*) In 1937 the legislature carried Regulation 193 (4) into the amended Act. Sec. 1(m), Ch. 117, Acts 1937 (see Appendix B), contains the provision that with respect to Indiana corporations "gross income" shall not include gross receipts from a business situated and regularly carried on at a legal situs outside of the State.

So, under Regulation 193 (4) and Section 1(m) of the 1937 law, manufacturer Y making products within the State may

ship them to warehouse or branch stores outside the State, and from such points sell the products without paying the Indiana tax upon the receipts. And this is true even though the purchaser sends his payment directly to Y's home office in Indiana, or though the cash, check or draft for the goods on being received at the branch or warehouse outside of the State is forwarded to the home office of Y in Indiana. But manufacturer Z who produces his products in the State of Indiana and ships them from Indiana directly to purchasers in other states and foreign countries is taxed upon all of the receipts from such sales under the state court's construction. Now if manufacturer Z should change his mode of business to that of manufacturer Y by selling his products from a situs in other states, he would be free from the Indiana tax on such receipts. In other words, a manufacturer by going out of interstate commerce originating in Indiana and into commerce originating in some other state escapes the burden of the tax. *Yet he may continue to enjoy and exercise within the State the privilege of manufacturing his goods there and of actually receiving his gross income in Indiana.* The only difference between Y and Z is that Y ships to himself in another state and then sells from that situs, while Z sells and ships directly from the home office and plant to the customer in another state.

The *American Manufacturing Co.* decision is based on the proposition that a state may tax the *local privilege of manufacturing* and measure that tax by the value of the goods manufactured, whether sold "*within or without the State,*" or in domestic or interstate commerce. (250 U. S. 463.) Under the instant law, a manufacturer producing all of his products in Indiana, pays a tax only upon receipts from sales made (a) in interstate commerce from Indiana, or (b) within the State of Indiana. No tax is levied on

receipts from sales made from a situs "without the State," though the goods are manufactured in Indiana.

Thus the tax in question clearly is not (1) a tax *on the privilege of manufacturing,* nor (2) a tax *measured by the value of all goods manufactured,* as in the *American Manufacturing Co. Case.*

As to distinction (3) mentioned *supra,* the tax is not limited to the value of the goods *in Indiana.* The Act in Section 1 (f) allows deduction of "freight prepaid by the taxpayer and repaid to him by the purchaser" which is the only provision which in any way permits deduction of transportation costs. This exemption has been strictly limited by Regulation 67, which provides in part:

> "In order to claim deductions of this kind on gross income tax returns, the shipper must have actually prepaid freight for the purchaser. In no case can the freight charges be deducted as an expense by either the shipper or his customers, and this deduction can in no way refer to freight charges which are a cost of doing business." (R. 93.)

In every case, therefore, where the goods are sold at a delivered price and delivery is made by train, truck, express or parcel post, the tax falls upon the entire gross receipts and not on the value of the goods in Indiana. Of course, in some situations the freight charge is a very substantial portion of the total selling price, and the tax in question therefore bears directly upon the selling price of the goods in interstate commerce and not upon their value in the State of Indiana. There is thus a tax charge upon the cost of interstate carriage. The suggestion of the state court that the effect of this tax might be avoided by changing the method of doing business is not an answer. The taxpayer is not required to change his method of doing

business to meet a taxing statute. "Surely he can not be compelled to take this inconvenient and expensive course." *Stockard v. Morgan*, 185 U. S. 27, 32.

The tax in the *American Manufacturing Co. Case* was limited to the value of the goods in St. Louis. The necessity of such a limitation was recognized in *Hope Natural Gas v. Hall*, which later was affirmed by this court. In fact, the state court in the last mentioned case specifically so limited the scope of the tax:

> "Consequently, we are *warranted in presuming that the Legislature did not mean to include, as an element of value, so much of the gross proceeds of the sale of an article in interstate commerce as is represented by the cost of transportation, and we restrain the operation of the statute accordingly. This presumption* and this limitation *are strengthened by the concluding sentence of the statute, whereby the measure of the tax is declared to be the value of the product in this state,* regardless of place of sale or delivery outside of state. If the sale of a commodity produced in this state imposes on the seller delivery in another state, then the sale price necessarily includes the cost of the delivery. Such sale price would not reflect the worth of the commodity in the state, but the worth within the state plus the cost of transportation. If the taxation value of the products named in the statute be limited to their value in the state, and before they enter interstate commerce, the statute does not manifest a purpose to violate article 1 of the federal Constitution, and we so hold."
>
> *Hope Natural Gas Co. v. Hall*, 102 W. Va. 272, affirmed 274 U. S. 284.

Thus, for all three reasons set forth *supra*, the *American Manufacturing Case* fails to support the gross income tax.

Other cases cited or discussed in the state court's opinion are not in point for the following reasons:

Peck & Co. v. Lowe, 247 U. S. 165, involved the Federal net income tax and the commerce clause was not in question. *Bass, Ratcliff & Gretton, Ltd. v. Tax Commission*, 266 U. S. 271, and *Shaffer v. Carter*, 252 U. S. 37, involved net income taxes. *Cudahy Packing Co. v. Minnesota*, 246 U. S. 450, and *Pullman Co. v. Richardson*, 261 U. S. 330, involved taxes, measured by gross earnings or gross receipts, in lieu of other property taxes. *Postal Telegraph-Cable Co. v. Richmond*, 249 U. S. 252, involved a license or occupation tax restricted to intrastate business, and the tax was assailed "upon inadequate evidence and upon purely empirical calculations which we are asked to adopt." (pp. 257, 261.)

It is unnecessary here to discuss the remaining cases referred to by the state court, as they all directly support appellant's contention and are elsewhere cited in this brief. In its discussion of the *Crew Levick Co.* and *American Manufacturing Co.* cases, the court below intimates that the former was virtually overruled by the latter. This can hardly be true. The latter case was decided at the succeeding term by the same Justices, and the opinion written by the same Justice as the former case. In *United States Glue Co. v. Oak Creek, supra,* decided at the same term as *Crew Levick Co. Case*, the latter was expressly reaffirmed and used as a basis for the distinction between a net income tax and a gross income tax as applied to the commerce clause; and on this distinction, the *United States Glue Co. Case* has been the controlling decision to the present time, and the *Crew Levick Co. Case* has been constantly cited with it by this Court. Further, in the *American Manufacturing Co. Case* opinion, the Court distinguishes the case from the *Crew Levick Case* and clearly indicates its continued approval of the latter. Also, and more important, it is to be noted that

the Court has had occasion to refer to the *American Manufacturing Co. Case* but relatively few times, and then often to distinguish the then pending case with the effect of limiting the scope of the *American Manufacturing Case;*[19] on the other hand, the *Crew Levick Co. Case* has been cited in the reports of this Court at least twenty-four times, and in each instance it has been referred to with other decisions as controlling in the case then before the Court, or cited, sometimes in dissenting opinions, as one of the authorities on the rule that a tax on gross receipts derived from interstate commerce is invalid.[20]

19.—*Shaffer v. Carter* (1920), 252 U. S. 37; *Public Utilities Commission of Rhode Island v. Attleboro Steam and Electric Company* (1927), 273 U. S. 83; *Hope Natural Gas Co. v. Hall* (1927), 274 U. S. 284; *Indian Motocycle Co. v. United States* (1931), 283 U. S. 570; *Utah Power and Light Company v. Pfost* (1932), 286 U. S. 165; *Federal Compress and Warehouse Co. v. McLean* (1934), 291 U. S. 17; *Liggett & Myers Tobacco Co. v. United States* (1937), 299 U. S. 383, 387.

20.—*United States Glue Co. v. Oak Creek* (1918), 247 U. S. 321; *Standard Oil Co. v. Graves* (1919), 249 U. S. 389; *Corn Products Refining Co. v. Eddy* (1919), 249 U. S. 427; *American Manufacturing Co. v. St. Louis* (1919), 250 U. S. 459; *Shaffer v. Carter* (1920), 252 U. S. 37; *Spalding & Bros. v. Edwards* (1923), 262 U. S. 66; *Sonneborn Bros. v. Keeling* (1923), 262 U. S. 506; *Texas Transport & Terminal Co. v. City of New Orleans* (1924), 264 U. S. 150; *Ozark Pipe Line Corp. v. Monier* (1925), 266 U. S. 555; *Jaybird Mining Co. v. Weir* (1926), 271 U. S. 609; *Di Santo v. Pennsylvania* (1927), 273 U. S. 34; *Northwestern Mutual Life Ins. Co. v. Wisconsin* (1927), 275 U. S. 136; *Macallen v. Massachusetts* (1929), 279 U. S. 620; *New Jersey Bell Tel. Co. v. State Board of Tax and Assessment* (1930), 280 U. S. 338; *Burnet v. Coronado Oil & Gas Co.* (1932), 285 U. S. 393; *Fox Film Corp. v. Doyal* (1932), 286 U. S. 123; *Anglo-Chilean Nitrate Sales Corp. v. Alabama* (1933), 288 U. S. 218; *Nashville, etc., R. Co. v. Wallace* (1933), 288 U. S. 249; *Virginia v. Imperial Coal Sales Co.* (1934), 293 U. S. 15; *Stewart Dry Goods Co. v. Lewis* (1935), 294 U. S. 550; *Fisher's Blend Station v. Tax Commission of Washington* (1936), 297 U. S. 650; *Henneford v. Silas Mason Co.* (1937), 300 U. S. 577; *Puget Sound Stevedoring Co. v. Tax Commission*, 82 L. ed. advance paging 64; *James v. Dravo Contracting Co.*, 82 L. ed. advance paging 138.

Attitude of Other States on Gross Receipts Tax

It is significant that of the several states which have passed sales, gross income, occupation or other excise tax laws by which in any manner gross receipts are made the measure of the tax, approximately four-fifths by their own volition have recognized that they may not impose a tax upon or measured by gross receipts derived from interstate commerce without violation of Article I, Sections 8 and 10 of the Federal Constitution. This deference to the commerce clause is by terms of the legislation, by administrative regulations, by opinion of attorney general, or by state court decision, as indicated in the footnote.[21]

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[21].—In a majority of the jurisdictions referred to in this note, the statute includes a provision identical with or closely analogous to Section 6 in the Indiana Gross Income Tax Act of 1933. **Alabama**—No. 194, Laws of Alabama, 1935, as construed by opinion of Attorney General, May 15, 1937, (Sales Tax); **California**—Laws of California, Deering Sup. 1935, Act 8493, as construed by Ruling 26, (Sales Tax); **Colorado**—Ch. 230, Laws of Colorado, 1937, as construed by Regulation 14, (Sales Tax); **Georgia**—*American Mills Co. v. Doyal* (1933), 46 Ga. App. 236, (Sales Tax); **Illinois**—Cl. 196, Laws of Illinois, 1933, p. 924, as construed by Article 5 of Rules and Regulations, (Occupation—Sales Tax); **Iowa**—Ch. 82, Laws of Iowa, 1933, first Special Session reenacted by Cl. 191, Laws of Iowa, 1937, as construed by opinion of Attorney General, April 6, 1934, (Sales Tax); **Kansas**—S. B. 522, Laws of Kansas, 1937; and see Rule 2, (Sales Tax); **Louisiana**—Act No. 75, Laws of Louisiana, 1936, as construed by opinion of Attorney General, August 29, 1936; *State v. Albert Mackie Co., Ltd.* (1918), 144 La. 339, (Sales Tax); **Michigan**—Public Act No. 167, Laws of Michigan, 1933, as construed by Article 31 of Rules and Regulations, and by *J. B. Simpson, Inc. v. O'Hara, et al.* (1936), 277 Mich. 55, (Sales Tax); **Mississippi**—Ch. 119, Laws of Mississippi, 1934, as construed by opinions of Attorney General, March 1, 1933 and December 18, 1934, (Privilege—Sales Tax); **Missouri**—Laws of Missouri, 1937, p. 552, as construed by Ch. III (a) of Rules and Regulations, and by opinion of Attorney General, November 19, 1935, (Sales Tax); **New Mexico**—Sec. 202, Ch.

73, Laws of New Mexico, 1935, as amended by H. B. 151, Laws of 1937, as construed by opinion of Attorney General, October 22, 1937, (Occupation—Gross Income Tax); **New York City**—(1) Local Law 22, Laws of New York City, 1937, as construed by Regulations, Article 37, and *National Cash Register Co. v. Taylor, Comptroller* (Nov. 23, 1937, New York), 11 N. E. (2d) 881. (Gross Receipts Tax) (2) Local Law 20, Laws of New York City, 1937, as construed by Regulations, Article 94, and *National Cash Register Co. v. Taylor, Comptroller, supra,* (Sales Tax); **North Dakota**—S. B. 80, Sec. 2, Laws of North Dakota, 1937, as construed by Rule 56, (Sales Tax); **Ohio**—Sec. 5546-2 of General Code of Ohio, as construed by Regulations, Article VIII-K, (Sales Tax); **South Dakota**—Ch. 205, Laws of South Dakota, 1935, as construed by Regulations, Article 6, and opinion of Attorney General, June 26, 1937; *State ex rel. v. Welsh* (1933), 61 S. D. 593, (Occupation—Sales Tax); **Texas**—Ch. 2, Article 7058-7064, Texas Civil Statutes, as construed by opinions of Attorney General, July 22, 1936, November 16, 1936, and February 2, 1937, (Occupation Tax); **Utah**—Ch. 63, Laws of Utah, 1933, as construed by Par. 6, Revised Regulations of January 1, 1936, (Sales Tax); **Washington**—Ch. 180, Laws of Washington, 1935, as amended by Cl. 227 (1937); (1) Title II, as construed by Rule 198. "The state Supreme Court recognized that state taxation of gross income derived from interstate commerce is forbidden by the Commerce Clause"—*Fisher's Blend Station v. Tax Commission,* 297 U. S. 650, at 652. (Occupation—Gross Income Tax). (2) Title III, as construed by Rule 198. (Sales Tax). (3) Title V, as construed by Rule 198, (Public Utilities—Gross Operating Revenue Tax); **West Virginia**—Article 13, West Virginia Code of 1937, as construed by Bulletin of May 12, 1934, and opinion of Attorney General, August 10, 1934; *Hope Natural Gas Co. v. Hall* (1926), 102 W. Va. 272, (Occupation Tax).

II

The Tax is Invalid as Applied to the Interest from Tax Exempt Bonds

The second error assigned is based upon the ground that the Gross Income Tax Act, as applied to interest from "tax exempt" bonds of Indiana municipalities, is an impairment of contract under Article 1, Section 10, of the Constitution of the United States.

In the trial court, it was stipulated that the bonds of Indiana municipal corporations issued prior to the effective date of the Gross Income Tax Act and held by appellant, "by the statutes of Indiana in force now and at the time of the issuance of such bonds . . . are declared to be exempt from taxation" (R. 29). The trial court found the bonds to be exempt from taxation, and the imposition of the tax on the interest from such bonds was held to be an impairment of contract contrary to the Constitution of the United States (R. 18), and held the Act unconstitutional in so far as it required the levy of the gross income tax upon the interest from such bonds (R. 20). On appeal to the Supreme Court of Indiana, the appellees in their brief assumed the existence of a contract of exemption from taxation, and limited their argument to the scope of the contract (R. 38-40). The State Supreme Court in its opinion conceded the existence of the contract. It stated:

> "The bonds from which the income was received are specifically exempted from taxation . . ." (R. 46).

So this inquiry may properly begin with the assumption that a contract exempting the bonds from taxation existed between the appellant and the various municipalities.

> *Hale v. Iowa State Board of Assessment and Review*, 82 L. Ed., advance paging, 66, 68;
>
> *Storen v. J. D. Adams Manufacturing Company*, 7 N. E. (2d) 941, 943.

The provisions of the law existing at the time of the issuance of a bond specifically exempting it from taxation become a part of the contract of the bondholder, and not

subject to impairment by the State.[22] This Court, however, need not decide this point, since the existence of a contract is conceded.

The Court Must Determine the Scope of the Contract

The power resides with this Court, when impairment of contract is urged, to determine the effect and meaning of the contract.

> *Hale v. Iowa State Board of Assessment and Review,* 82 L. Ed., advance paging, 66, 68;
> *State ex rel. Anderson v. Brand,* 82 L. Ed., advance paging, 444, 448;
> *United States Mortgage Co. v. Matthews,* 293 U. S. 232, 236;
> *Funkhouser v. Preston,* 290 U. S. 163, 167.

The state court's declaration that the exemption does not apply to any excise tax upon a privilege, and that the gross income tax is of that type, is therefore the very inquiry to be made in this case. The original statute providing for the exemption of municipal obligations from taxation was adopted in 1903 as a *separate and independent* Act. Cf. *Hale v. Iowa State Board of Assessment and Review,* 82 L. Ed., advance paging, 66, 69. In its entirety, the Act reads as follows:

> "AN ACT to exempt from taxation all bonds, notes and other evidences of interest-bearing debt issued by the State or by municipal corporations.
>
> *Section* 1. *Be it Enacted by the General Assembly of the State of Indiana,* That all bonds, notes and other

[22].—*Murray v. Charleston,* 96 U. S. 432; *Macallen v. Massachusetts,* 279 U. S. 620, 634; *United States, ex rel. v. City of Quincy,* 71 U. S. 535, 549; *Cooley's Constitutional Limitations, 8th Edition,* Vol. 1, p. 571.

evidences of indebtedness hereafter issued by the State of Indiana or by municipal corporations within the State upon which the said State or the said municipal corporations pay interest shall be exempt from taxation."

(Acts of Indiana, 1903, Chapter CLXXIX, page 322.)

Sixteen years later, when all of the tax laws of the State were codified, this section without change became Section 5 (twentieth) of Chapter 59, Acts of 1919, p. 203.

Section 5 of the 1919 Act has been amended four times since its enactment, but the twentieth paragraph, touching the exemption of municipal bonds, was not changed in any respect by these amendments until 1937. The intermediate amendments of the section were made in Section 1 (twentieth), Chapter 49, Indiana Acts 1920, p. 168; Section 6 (twentieth), Chapter 222, Indiana Acts 1921, p. 650; Section 1 (twentieth), Chapter 191, Indiana Acts 1923, p. 562. Ind. Stat. Ann. (Burns') 1933, Sec. 64-201 (twentieth).

In 1937, this exemption section was rewritten, and the clause exempting bonds from taxation, so far as pertinent here, now reads as follows:

"The following property shall be exempt from taxation:

. . .

Nineteenth. All bonds and other evidences of indebtedness hereafter issued by or in the name of any municipality or other political or civil subdivision of the State of Indiana . . . shall be exempt from taxation, *unless otherwise expressly provided by law.*" (Section 1 (nineteenth), Chapter 262, Indiana Acts 1937, page 1237.)

The Gross Income Tax Act was amended in 1937 (Ch. 117, Acts 1937), effective March 9, 1937 (Appendix B). The

amendment of the tax exemption law, set out above, became effective June 7, 1937. The 1937 amendment touching the tax exemption is the last law upon the subject.

Many statutes authorizing the issuance of bonds adopted prior to May 1, 1933 (the effective date of the Gross Income Act), contain exemptions from taxation similar in form to the 1903 Act.[23]

Since the enactment in 1933 of the gross income tax law, the Legislature has adopted statutes providing for the issuance of bonds which have included exemptions from taxation. These laws in language are similar to the original 1903 exemption law.[24]

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[23].—*Sanitary District Bonds,* Ch. 307, Sec. 8, Acts of 1913, as amended by Ch. 11, Sec. 4, Acts of 1919 and Ch. 100, Sec. 3, Acts of 1931, (1933 Burns 48-4108); *County Highway Bonds,* Ch. 112, Sec. 36, Acts of 1919, (1933 Burns 36-702); *Park District Bonds,* Ch. 144, Sec. 25, Acts of 1919, as amended by Ch. 42, Sec. 1, Acts of 1920 and Ch. 251, Sec. 1, Acts of 1927, (1933 Burns 48-5525); *County Library Bonds,* Ch. 120, Sec. 1½, Acts 1929, (1933 Burns 41-519); *Water Works Purchase Bonds,* Ch. 96, Sec. 12, Acts of 1921, as amended by Ch. 190, Sec. 2, Acts of 1927, (1933 Burns 48-5357); *Highway Assessment Bonds,* Ch. 262, Sec. 37, Acts of 1921, (1933 Burns 36-1437); *Sewer Bonds,* Ch. 93, Sec. 9, Acts of 1927, (1933 Burns 48-3935).

[24].—*Exemption of Waterworks Bonds,* effective March 9, 1933, reading: "Said bonds shall be exempt from taxation for any and all purposes." Chapter 235, Acts of Indiana 1933, p. 1076; *Exemption of Utility Revenue Bonds,* effective March 11, 1933, reading that said bonds "shall be exempt from taxation for any and all purposes." Chapter 254, Acts of 1933, p. 1137; *Exemption of Sewage Disposal Bonds,* effective March 8, 1933, reading: "Said bonds shall be exempt from all taxation, state, county and municipal." Chapter 187, Acts of Indiana 1933, p. 924; *Exemption of Interstate Bridge Bonds,* effective March 9, 1937, reading: "The said bonds shall be exempt from taxation by the State of Indiana and by the municipalities and political subdivisions thereof." Chapter 141, Acts of Indiana 1937, p. 798.

No construction of the statutory contract may fairly be predicated upon the ground that the exemption of municipal bonds is merely a part of a larger section generally exempting property from taxation. The legislative history of the exemption refutes such a suggestion. Its existence ante-dates by sixteen years the general tax code; and similar exemptions after the date of the code, and even after the gross income tax law, have stated the exemption from taxation in the same terms. Cf. *Hale v. Iowa State Board,* 82 L. Ed., advance paging, 66, 69.

Other than in the instant case, no decision of the state Supreme Court has construed the scope and extent of statutes exempting bonds from taxation.

To Tax Gross Income from Bonds is to Tax the Bonds

Regardless of how this tax has been characterized by the state court, its operation is to impose a charge of one per cent (R. 79, 92) upon every dollar of interest received from municipal bonds declared to be tax exempt. The tax is not upon the *net result* of many transactions, but is upon *gross receipts,* and the extent of the tax varies with every dollar of interest received. The law takes one cent from every dollar received as interest on bonds. This amounts to a levy upon the bonds themselves. In *Northwestern Mutual Life Insurance Company v. Wisconsin,* 275 U. S. 136, this Court reversed a decision of the Supreme Court of Wisconsin which denied a right to the appellant to recover excess taxes paid. The law under which the tax was assessed and sought to be recovered was a license tax imposed upon life insurance companies at the rate of three per cent on *gross income,* after allowing for certain deductions. The company asserted that the law imposed a tax directly upon Federal bonds owned by it in violation of the Constitution since the law permitted

no deduction for interest derived from such bonds. The State contended as follows:

"*Counsel for the state maintain that the effect of Sec. 76.34 is to impose upon domestic insurance companies a privilege or franchise tax, and not one on property or income;* that no charge is laid upon bonds of the United States, but the fee exacted is for *granted privileges,* including *exemption from personal property taxation and right to do business;* that the state may require domestic corporations to pay privilege, franchise or license taxes measured by gross income, although partly derived from United States bonds; and that in no proper sense can the challenged tax be regarded as one directly imposed upon gross income." (275 U. S. 139.)

The Court held that bonds of the United States were beyond the taxing power of the State. The Court said:

". . . it has been the settled doctrine here that where the principal is absolutely immune, no valid tax can be laid upon income arising therefrom. To tax this would amount practically to laying a burden on the exempted principal. Accordingly, if the challenged act, whatever called, really imposes a direct charge upon interest derived from United States bonds, it is pro tanto void."

. . .

"The distinction between an imposition, the amount of which depends upon dividends or net receipts, and one measured by gross returns is clear. *United States Glue Co. v. Oak Creek,* 247 U. S. 321, 328, and earlier opinions there cited." (275 U. S. 140.)

. . .

"Here the statute undertook to impose *a charge* of 3 per cent *upon every dollar of interest* received by the company from United States bonds. So much, in any event, the state took from these very receipts.

> This *amounts*, we think, to *an imposition upon the bonds themselves,* and goes beyond the power of the state." (275 U. S. 141.)

Support for the argument as to the distinction between the effect of a gross receipts tax and a net income tax upon a transaction need not be elaborated at this point. In the earlier part of this brief, upon the subject of interstate commerce, this distinction which is so well stated in the *United States Glue Company Case,* referred to in the quotation *supra,* is developed. At this point it is sufficient to note that the fundamental distinction made in the interstate commerce cases is made in the cases dealing with the effect of a tax upon interest from bonds declared to be exempt from taxation or a state tax upon interest on bonds of the federal government.

The principle of the *Northwestern Mutual Life Insurance Case,* cited supra, has not been repudiated by this Court. The principle of the case is applicable with equal force on the question of impairment of contract. The tax in question bears directly upon the bonds themselves since it varies directly with the interest on the bonds, and by a parity of reasoning this case must be controlled by the *Northwestern Mutual Life Insurance Case.*

Subsequent decisions of this Court, most of them, however, dealing with net income taxes, have, either in the majority or dissenting opinion, adverted to the distinction arising in the *United States Glue Company Case* and relied upon in the *Northwestern Mutual Life Insurance Company Case.*

In the case of *National Life Insurance Company v. United States,* 277 U. S. 508, the majority of this Court held invalid an Act of Congress imposing a net income

tax upon life insurance companies. The tax was in the nature of an excise or license tax, and provided for a deduction of all interest derived from tax exempt securities, and also for a flat deduction of four per cent of "gross income," provided that the first exemption granted should be deducted from the four per cent exemption. The net result of the tax in the case presented was to allow no different exemption for a company owning municipal securities than one not owning such securities. The majority of the Court felt that the tax was directly upon the securities and therefore invalid. The Court said:

> "It is settled doctrine that *directly to tax* the income from securities amounts to taxation of the securities themselves. *Northwestern Mutual Life Insurance Co. v. Wisconsin,* 275 U. S. 136. . . ." (277 U. S. 521.)

The dissenting opinion proceeded upon the ground that the tax was valid since it was a net income tax. In this opinion was said:

> "As the tax imposed by the Act of 1921 is on net income, I should have supposed that it was settled by *Flint v. Stone Tracy Co.,* 220 U. S. 107, that the inclusion in the computation of the interest on tax-exempt bonds, like the inclusion of the receipts from exports (*William E. Peck v. Lowe,* 247 U. S. 165; *Barclay & Co. v. Edwards,* 267 U. S. 442, 447), or the inclusion in a state tax of receipts from interstate commerce (*United States Glue Co. v. Oak Creek,* 247 U. S. 321, 326; *Shaffer v. Carter,* 252 U. S. 37, 57; *Underwood Typewriter Co. v. Chamberlain,* 254 U. S. 113, 120) would not have rendered the tax objectionable." (277 U. S. 527.)
>
> . . .
>
> "I find nothing in the cases cited by the petitioner which lends support to the view that its rights have been violated. *Directly to tax the gross income from*

securities amounts, of course, to taxing the securities themselves. Northwestern Mut. L. Ins. Co. v. Wisconsin, 275 U. S. 136. . . ." (277 U. S. 532.)

Another case in which the *Northwestern Mutual Life Insurance Company Case* is cited is that of *Macallen Company v. Massachusetts,* 279 U. S. 620. In that case this Court held invalid an Act of the State of Massachusetts imposing an excise tax upon domestic corporations, so far as the Act purported to include in net income the interest on bonds of the Federal Government and of municipal corporations of Massachusetts expressly exempt by statute. The exemption section of the Massachusetts law, which is Section 5 (25) of Chapter 59 of the General Laws of Massachusetts of 1921, is in terms almost identical with the Indiana exemption act. The majority of the Court, in answer to the attack that the tax impaired the obligation of contract as applied to interest derived from tax exempt securities, said:

> ". . . bonds of Massachusetts counties and municipalities which, when issued and acquired by the corporation were exempt from taxation by the terms of a statute." (279 U. S. 624.)

The Court held:

> "We conclude that the . . . Act in substance and effect imposes a tax upon . . . the county and municipal bonds. . . . The Act is void . . . as . . . the Act impairs the obligation of the statutory contract of the State by which the bonds were made exempt from state taxation." (279 U. S. 634.)

In a dissenting opinion, the distinction between net and gross receipts taxes is noted. This opinion states:

> "The tax is not measured by gross income as in *Northwestern Mutual Life Insurance Co. v. Wisconsin,*

> 275 U. S. 136, where the validity of an excise measured by net income was recognized. The distinction between net income and gross, as the measure of a tax, is well established. *William E. Peck & Co. v. Lowe,* 247 U. S. 165; cf. *Crew Levick Co. v. Pennsylvania,* 245 U. S. 292; *United States Glue Co. v. Oak Creek,* 247 U. S. 321, 328. Being on net income, the tax does not vary in exact proportion to the gross income from the tax exempt securities included in the aggregate." (279 U. S. 635.)

The dissenting opinion concluded that since the tax was upon net income it should be held valid.

The distinction between a net and gross income tax is again referred to by this Court in the case of *Fox Film Corporation v. Doyal,* 286 U. S. 123, where the Court held valid a gross receipts tax as applied to the licensing of copyrighted moving pictures. The Court placed the holding upon the grounds that a copyright was not a Federal instrumentality, but at the outset of the opinion, the Court said:

> "The Gross Receipts Tax Act (Georgia Laws 1929, p. 103), describes the tax as laid 'upon the privilege of engaging in certain occupations' and 'upon certain business and commercial transactions and enterprise.' As the tax is measured by gross receipts, the case is not ruled by *Educational Films Corp. v. Ward,* 282 U. S. 379, where the tax was based upon the net income of the corporation. Appellant insists, and we think rightly, that the operation of the statute here in question, in its *application to gross receipts,* is to *impose a direct charge* upon the royalties. *Northwestern Mut. L. Ins. Co. v. Wisconsin,* 275 U. S. 136, 141; see also *Crew Levick Co. v. Pennsylvania,* 245 U. S. 292, 297; *United States Glue Co. v. Oak Creek,* 247 U. S. 321, 328, 329; *New Jersey Bell Teleph. Co. v. State Bd. of Taxes and Assessments,* 280 U. S. 338, 346. The question is thus presented whether copy-

rights are to be deemed instrumentalities of the Federal Government and hence immune from state taxation." (286 U. S. 126.)

The latest case of this Court dealing with this subject also recognizes the clear line between a gross and a net tax. In this case, the Court held valid a net income tax of the State of Iowa as applied to the interest from tax exempt municipal securities. In the case, the Court said:

> "*The tax is laid upon the net results of a bundle or aggregate of occupations and investments. Under a statute so conceived and framed a man may own a quantity of state and county bonds and pay no tax whatever. The returns from his occupation and investments are thrown into a pot, and after deducting payments for debts and expenses as well as other items, the amount of the net yield is the base on which his tax will be assessed.* Cf. *United States Glue Co. v. Oak Creek,* 247 U. S. 321, 329. In the light of all the precedents brought together in this opinion, we cannot say that a tax assessed on such a base is a plain violation of any contract of exemption to be discovered in the laws of Iowa." *Hale v. Iowa State Board of Assessment and Review,* 82 L. Ed., advanced paging, 66, 72.

The case of *Orr v. Gilman,* 183 U. S. 278, upon which the Supreme Court of Indiana relies, is not controlling upon this point. It is settled that an inheritance or succession tax is a tax upon the privilege of receiving property or, upon the privilege of transferring property at death and not upon the property transferred.

Magoun v. Illinois Trust & Savings Bank, 170 U. S. 283, 288;

Crittenberger v. State, 189 Ind. 411, 423;

See cases collected, 103 A. L. R. 81.

The gross income tax now before the Court is a *recurrent tax* that falls upon every dollar of interest from the tax exempt bonds as it is received. It is levied directly upon all interest and must be paid quarterly. An inheritance or succession tax is a sporadic tax. Bonds may even mature before it is assessed. It is never paid by the owner of the security but by his estate or his heirs after his death. It is a tax that is assessed but once in a lifetime. The *net estate* is taxed by such acts, allowance being made for debts against the appraised value of the assets of the estate. Indirect and remote is the effect of such taxation upon a contract of exemption. Direct and immediate is this gross tax which quarterly takes one cent from every dollar of interest on the exempt bonds.

The distinction that appellant here seeks to draw between the case of *Orr v. Gilman* and this case is demonstrated by the decisions of this Court. In *Snyder v. Bettman,* 190 U. S. 249, this Court held valid a Federal succession tax upon a bequest to a municipal corporation. Later, this Court held invalid an Act of Congress imposing an excise tax upon insurance companies so far as that tax included in its measure the interest from tax exempt state and municipal bonds. *National Life Insurance Company v. United States,* 277 U. S. 508. Likewise, in *Plummer v. Coler,* 178 U. S. 115, this Court held valid a state inheritance tax upon a legacy of United States bonds declared by the statute under which they were issued to be exempt from state taxation. However, this Court has held invalid a State gross receipts tax which included the interest from bonds of the United States. *Northwestern Mutual Life Insurance Co. v. Wisconsin,* 275 U. S. 136. These four cases demonstrate the practical line of distinction between a direct annual tax upon the interest from tax

exempt securities and the indirect inheritance tax on the privilege of transferring such securities at death.

Cf. James v. Dravo Contracting Co., 82 L. Ed. advance paging 125, 136, 143-144.

We respectfully submit that the Indiana tax on gross receipts impairs the admitted obligation of contract that the bonds shall be exempt from taxation, since it takes from the interest on such bonds a part of every dollar received.

Conclusion

In view of the foregoing, the decision of the Supreme Court of the State of Indiana should be reversed.

Respectfully submitted,

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Harry T. Ice,
Attorneys for Appellant.

Matson, Ross, McCord & Clifford,
Of Counsel.

February 15, 1938.

APPENDIX A

Chapter 50, Indiana Acts 1933

(Ind. Stat. Ann. (Burns) Sec. 64-2601 et seq.)

AN ACT to provide for the raising of public revenue by imposing a tax upon the receipt of gross income, to provide for the ascertainment, assessment and collection of said tax, and to provide penalties for the violation of the terms of this Act, and declaring an emergency.

Section 1. Be it enacted by the general assembly of the State of Indiana, That this Act may be cited as the "Gross Income Tax Act of 1933."

(a) When used in this Act, the term "person" or the term "company" herein used interchangeably, includes any individual, firm, copartnership, joint venture, association, corporation, municipal corporation, estate, trust, or any other group or combination acting as a unit, and the plural as well as the singular number, unless the intention to give a more limited meaning is disclosed by the context.

* * *

(f) The term "gross income," except as hereinafter otherwise expressly provided, means the gross receipts of the taxpayer received as compensation for personal services, and the gross receipts of the taxpayer derived from trades, businesses or commerce, and the gross receipts proceeding or accruing from the sale of property, tangible or intangible, real or personal, or service, or any or all of the foregoing, and all receipts by reason of the investment of capital, including interest, discount, rentals, royalties, fees, commissions or other emoluments, however designated, and without any deductions on account of the costs of property sold, the cost of materials used, labor cost, interest or discount paid, or any other expense whatsoever, and without any deductions on account of losses; Provided, however, That the term "gross income" shall not include cash discounts allowed and taken on sales; nor freight prepaid by the taxpayer and repaid to him by the purchaser; goods, wares, or merchandise, or the value thereof,

returned by customers when the sale price is refunded either in cash or by credit; nor the sale price of any article accepted as part payment on any new article sold, if and when the full sale price of the new article is included in the "gross income" subject to taxation under this Act; Provided, further, That "gross income" shall include the proceeds from the sale of any property handled on consignment by the taxpayer.

(g) In the case of banks, trust companies, building and loan associations, brokers, finance companies, dealers in commercial paper, and persons engaged in the business of lending money or credit, the term "gross income" shall be deemed to mean gross earnings in respect to that part of the total gross income of such persons which is derived from the businesses and activities enumerated in this subsection.

(h) In case of domestic insurance carriers, gross income shall not include income which becomes a reserve or other policy liability in accordance with the laws of this state or the rulings of the duly authorized supervisory officials and shall not include such premium income as is derived from business conducted outside this state on which such domestic insurance carrier pays a premium tax of one per cent or more.

Sec. 2. There is hereby imposed a tax, measured by the amount or volume of gross income, and in the amount to be determined by the application of rates on such gross income as hereinafter provided. Such tax shall be levied upon the entire gross income of all residents of the State of Indiana, and upon the gross income derived from sources within the State of Indiana, of all persons and/or companies, including banks, who are not residents of the State of Indiana, but are engaged in business in this state, or who derive gross income from sources within this state, and shall be in addition to all other taxes now or hereafter imposed with respect to particular occupations and/or activities. Said tax shall apply to, and shall be levied and collected upon, all gross incomes received on or after the first day of May, 1933, with such exceptions and limitations as may be hereinafter provided.

Sec. 3. The tax hereby provided for shall be imposed at the following rates:

(a) Upon the entire gross income of every person engaged in the business of manufacturing, compounding, or preparing for sale, profit, or use, any article or articles, substance or substances, commodity or commodities; or in the business of mining and/or producing for sale, profit, or commercial use any oil, natural gas, stone, coal, sand, gravel or other mineral product, or felling and producing timber, for sale, profit or commercial use; or in agriculture, including the production of live stock, poultry, eggs, or any other product of the farm, orchard, garden or greenhouse, one-fourth of one per cent.

(b) Upon the entire gross income of every person engaged in the business of wholesaling and/or jobbing tangible commodities not specifically mentioned in subsection (d) of this section, one-fourth of one per cent.

(c) Upon the entire gross income of every person engaged in the business of retailing of any tangible commodity or commodities not specifically mentioned in subsection (d) of this section, one per cent.

. . .

(f) Upon the gross income of every person engaged in any business or activity not enumerated in subsections (a) to (e), inclusive, of this section, including, but not in limitation of the foregoing, the gross income from professional services, personal services, sales of real estate, all funds received for the performance of contracts, all funds from the investment of capital, and all receipts from any source whatsoever, one per cent.

. . .

Sec. 5. In computing the amount of tax levied under the provisions of this Act for any year, there shall be deducted from the gross income of the taxpayer an amount of one thousand dollars. . . .

Sec. 6. There shall be excepted from the gross income taxable under this Act:

(a) So much of such gross income as is derived from business conducted in commerce between this state and other states of the United States, or between this state and foreign coun-

tries, to the extent to which the State of Indiana is prohibited from taxing under the Constitution of the United States of America. There shall also be excepted from such gross income, salaries, pensions, and other emoluments paid by the United States of America or any of its agencies, and interest or other earnings paid upon bonds or other securities issued by the United States of America or its agencies, to the extent that the State of Indiana is prohibited from imposing a tax upon such salaries, pensions, emoluments, interest and/or earnings, by the Constitution of the United States of America.

(b) All taxes received or collected by the taxpayer as agent for the State of Indiana and/or the United States of America.

(c) So much of such gross income as is derived from sales to the United States government, its departments, or agencies, to the extent to which the State of Indiana is prohibited from taxing under the Constitution of the United States of America.

(d) Amounts received under life insurance policies and contracts paid by reason of the death of the insured.

(e) Amounts received, other than amounts paid by reason of the death of the insured, under life insurance endowment or annuity contracts, either during the term, or at maturity, or upon surrender of the contract, but in no case in excess of the total amount of the premiums paid upon such contracts.

Sec. 7. There are, however, excepted from the provisions of this Act:

(a) Insurance companies which pay the State of Indiana a tax of more than one per cent upon premiums levied under the provisions of the laws of this state.

(b) Labor, agricultural and horticultural societies and other organizations not operated for profit; cemetery associations and companies which are organized and operated exclusively for the benefit of their members; fraternal benefit societies, orders or associations, operating under the lodge system for the exclusive benefit of the members, and providing

for the payment of death, sickness, accident or other benefits to the members of such societies, orders or associations, and to the dependents of such members; corporations, associations or societies organized and operated exclusively for religious, charitable, scientific, fraternal or educational purposes; business leagues, chambers of commerce, boards of trade, civic leagues and other organizations operated exclusively for the benefit of the community and for the promotion of social welfare; Provided, however, That this exception shall apply only to companies, organizations, corporations and/or societies named in this subsection which are not organized for profit, and no part of the income of which inures to the benefit of any stockholder or other private individual.

. . .

Sec. 9. (a) The taxes levied hereunder shall be due and payable in quarterly installments, on or before the fifteenth day of January, April, July and October in each year, for the period ending on the last day of the preceding month. The taxpayer shall, on or before the fifteenth day of such months, make out a return, in the form required by subsection (c) of this section, showing the amount of the tax for which he is liable, for the preceding quarter, and shall mail the same, together with a remittance for the amount of the tax, to the office of the department of treasury. . . .

. . .

Sec. 15. The tax imposed by this Act shall be in addition to all other licenses and taxes imposed by law as a condition precedent to engaging in any business taxable hereunder, except as in this Acct otherwise specifically provided. But no municipality shall be authorized to levy any tax by virtue of the provisions of this Act.

. . .

Sec. 17. On or before the fifth day of each month the total amount received from taxes levied under the provisions of this Act during the preceding month shall be paid by the department of treasury into the state treasury and credited to the general fund, and said funds shall be available for any purposes for which the legislature has made appropriations.

Sec. 25. (a) The department of treasury shall from time to time promulgate such rules and regulations not inconsistent with this Act, for making returns and for the ascertainment, assessment, and collection of the tax imposed hereunder, as it may deem necessary and desirable; and upon request shall furnish any taxpayer with a copy of such rules and regulations.

(b) All forms necessary and proper for the enforcement of this Act shall be prescribed, printed and furnished by the department of treasury.

APPENDIX B

Chapter 117, Indiana Acts 1937

(Ind. Stat. Ann. (Burns), Dec. 1937 Cum. Pocket Supp. Sec. 64-2601, *et seq.*)

AN ACT to amend Sections 1, 2 (reciting the sections and title of the Gross Income Tax Act of 1933, and of prior amendments thereto) and declaring an emergency.

Section 1. Be it enacted by the general assembly of the State of Indiana, That Section 1 of the first above entitled act be amended to read as follows: Sec. 1. That this act may be cited as the "Gross Income Tax Act of 1933."

. . .

(m) The term "gross income," except as hereinafter otherwise expressly provided, means the gross receipts of the taxpayer received as compensation for personal services, . . . and the gross receipts received from the sale, transfer, or exchange, of property, tangible of intangible, real or personal, including . . . all receipts received by reason of the investment of capital, including but not in limitation thereof, interest, discounts, . . . Provided, further, That with respect to individuals resident in Indiana and corporations incorporated under the laws of Indiana authorized to do and doing business in any other state and/or foreign country, the term "gross income" shall not include gross receipts received from sources outside the State of Indiana in cases where such gross receipts are received from a trade or business situated and regularly carried on at a legal situs outside the State of Indiana, or from activities incident thereto (including the disposal of capital assets or other properties which had been theretofore acquired or used in carrying on such trade or business). . . .

Supreme Court of the United States

October Term, 1937

No. 641

J. D. ADAMS MANUFACTURING COMPANY,
Appellant,

vs.

WILLIAM STOREN, as Chief Administrative Officer of The Department of Treasury of the State of Indiana, et al.,
Appellees.

Appeal From the Supreme Court of the State of Indiana

SUPPLEMENT TO APPELLANT'S BRIEF AND APPENDIXES C AND D

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Supreme Court of the United States

October Term, 1937

J. D. ADAMS MANUFACTURING COMPANY, *Appellant*, *vs.* WILLIAM STOREN, as Chief Administrative Officer of The Department of Treasury of the State of Indiana, et al., *Appellees.*	No. 641

Appeal From the Supreme Court of the State of Indiana

SUPPLEMENT TO PART I OF APPELLANT'S BRIEF TOUCHING INTERSTATE COMMERCE

A. Under the general taxation law of Indiana, all property is assessed for taxation at its "true cash value". In the case of corporations and all other business concerns, earning capacity and other elements entering into the value of a going concern are taken into consideration in determining the valuation for tax purposes. To this valuation interstate and foreign business adds its share in the proportion which it bears to the total business of the taxpayer. In thus directly contributing to *property taxes,* interstate commerce "pays its way" in Indiana, entirely outside of the gross receipts tax on such commerce.

"All property within the jurisdiction of this state, not expressly exempted, shall be subject to taxation. All property of every kind and nature, both real and personal, and wherever situated, owned or possessed, and subject to taxation within the state of Indiana, shall be assessed and valued for taxation purposes, at the true cash value thereof, on the first day of March in each year in which it is subject to assessment and valuation for taxing purposes. The rate of taxation on all property shall be equal." (Acts of 1919, ch. 59, Sec. 3, p. 198; Ind. Stat. Ann. (Burns'), Sec. 64-103).

"* * * In determining and settling such valuation, such assessor, except as otherwise provided in this act, shall be governed by what is the true cash value, and in determining the true cash value, he may consider the market or usual selling price, or *the earning capacity of such property* and all other facts and circumstances which may give any information concerning the true cash value. * * *" (Acts 1919, ch. 59, Sec. 61, p. 198; Ind. Stat. Ann. (Burns'), Sec. 64-601).

B. In appellees' brief there is set out as Appendix E, at page 93, a statement of the taxes collected in Indiana from 1929 to 1937. Appendix E was apparently designed as support for the argument made at pages 39 to 41 of appellant's brief that the gross income tax is *in lieu* of property taxes. Unexplained, Appendix E is misleading. The figures are doubtless correct, but they do not present a complete and true picture of the results of the gross income tax in relation to property taxes. This cannot be done by general state totals. Whether a tax is an actual burden on commerce, or whether it is actually *in lieu* of property taxes, depends upon its concrete effect upon the taxpayer and not upon its relation to the state as a whole.

The Appendix does show a reduction of property taxes and also of total taxes. The impression is left that the gross income tax was responsible for this reduction. This is incorrect. In a large measure, the reduction is due to the general retrenchment in local government during the depression, to the influx of federal funds for relief which were not available prior to 1933, and to reduced commodity prices on supplies required by government.

But the reduction in total taxes was not shared proportionately by the industrial centers of the State. When the tax system is understood, the reason for this difference is apparent. Chapter 96 of the Acts of Indiana, 1933 (Burns' Ind. Stat. 1933, Sec. 28-1001) was a companion measure of the gross income tax act. Chapter 96 provided for payment out of the general fund of the State to every school unit in the state \$600 per annum for every licensed instructor. By amendments, the allowance has been increased to \$700 (Chapter 161, Acts 1935, Chapter 194, Acts 1937). The source of revenue to the general fund to provide for these payments was the gross income tax. The result of the operation of these companion measures demonstrates clearly that even if the Court should look to all the laws of the State to determine the effect of the gross income tax, as contended by appellees, the tax still constitutes an additional direct burden on industry.

There are 92 counties in Indiana. One-half of the population resides in the 15 large counties. All, or practically all, of the large commercial enterprises of the State are located in the 15 large counties. About 65% of the entire gross income tax is paid by taxpayers in these 15 counties. The tax goes into the general fund of the State. By far the largest single items paid out of the general fund are the sums paid to local school units under the provisions of

the companion measure of the gross income tax act referred to above.

There follows "Appendix C" showing the amount of property taxes and gross income taxes collected, together with funds returned to school units in the 15 largest and 5 of the small counties of the State. The period covered is the same as that covered by Appendix E of appellees' brief.

A glance at Appendix C shows clearly that the gross income tax is an additional burden on commercial enterprise, and is not *in lieu* of property taxes. Prior to 1933, the major portion of the cost of operation of schools was borne by local property taxes in the school units. Now, however, by virtue of the gross income tax act and its companion measure, large sums are annually paid from the general fund of the State to local school units, the general fund being fed primarily by the gross income tax. So the reduction of property taxes (to the extent not accounted for by reduced commodity prices, retrenchment in government, and federal funds) is due chiefly to the fact that the operation of schools in the small counties was no longer supported by local property taxes but from the general fund—that is, from gross income taxes. But the large counties which pay the major portion of the gross income taxes do not receive funds for school purposes in the same proportion as the small counties, nor in proportion to their contributions to such taxes.

For example—in Marion County (the largest county, and the one in which appellant's plant is located), the gross income tax paid ranged from $2,000,000 in 1933 to nearly $5,000,000 in 1936, while payments from the State for school purposes to units in Marion County ran from only $800,000

to $1,000,000 in the same years. On the other hand, in Brown County, the payment of gross income tax ranged from only $2,000 in 1933 to $4,000 in 1936, while payments from the state general fund for school purposes ranged from $22,000 to $27,500 in the same period.

Thus, the plain effect of the gross income tax law and its companion measure is to put an additional burden on the industrial centers of the state wherein much the largest portion of interstate commerce originates, and largely to impose upon such centers the cost of the schools in small units of the state. And the reduction of property taxes, if any, attributable to the gross income tax has been brought about primarily in the small non-commercial counties at the expense of the large industrial counties.

It should be remembered also that gross income tax figures do not as yet include the accrued taxes on interstate commerce, which to date, under provisions of Regulation 3801 of the Gross Income Tax Division (Statement as to Jurisdiction, p. 48) have been deferred.

Appellant has set out Appendix C not for the purpose of questioning the right of the State to provide that the schools shall be so financed, but for the purpose of demonstrating that the gross income tax is not *in lieu* of property taxes, but as to practically all business constitutes an addition to property taxes.

How true this statement is appears from "Appendix D" which shows the actual taxes paid by this appellant, and demonstrates clearly that as to companies such as appellant, the property tax burden has not been decreased, and that in addition the gross income tax, if collected on receipts from interstate commerce, has more than doubled the total tax burden. What is true of the appellant is

typical of the majority of industrial enterprises in the state engaged in interstate commerce. The gross income tax and its companion measure have operated not to reduce property taxes but to substantially increase the tax burden on industrial enterprises.

SUPPLEMENT TO PART II OF APPELLANT'S BRIEF TOUCHING IMPAIRMENT OF CONTRACT

Appellee cites and relies upon Sec. 25, Chap. 59, Acts of Indiana 1919, Burns' Ind. Stat. 1933, Sec. 64-506 (see appellee's brief, pp. 18, 81). This section was not cited or relied upon either in the trial court or the state Supreme Court. In fact, the section has by implication been repealed by Chapters 81, 82 and 83, Acts of Indiana 1933 (Burns' Stat. 1933, Sec. 64-801, 64-822, 64-901, et seq.). These three statutes provide for the taxation of intangible property, such as stocks, bonds, notes and the like, building and loan stock and bank deposits, not in the same manner as personal property, as they were theretofore assessed, but only in the manner provided in these respective acts. These laws went into force the day following the effective date of the gross income tax act, and so far as accrued interest on bonds is concerned, such interest is now taxed exclusively under these foregoing acts.

Section 25 of Chapter 59 of the Acts of 1919 referred to in appellees' brief simply relates to the *listing for taxation* of accrued interest on bonds. This Section stands directly in conflict with these three later acts and therefore is impliedly repealed by these acts. Appellant had assumed, since the Section was not cited in either the trial or state court, that appellees had recognized the fact that the Sec-

tion no longer had any operative effect, and therefore no bearing upon the present case.

Respectfully submitted,

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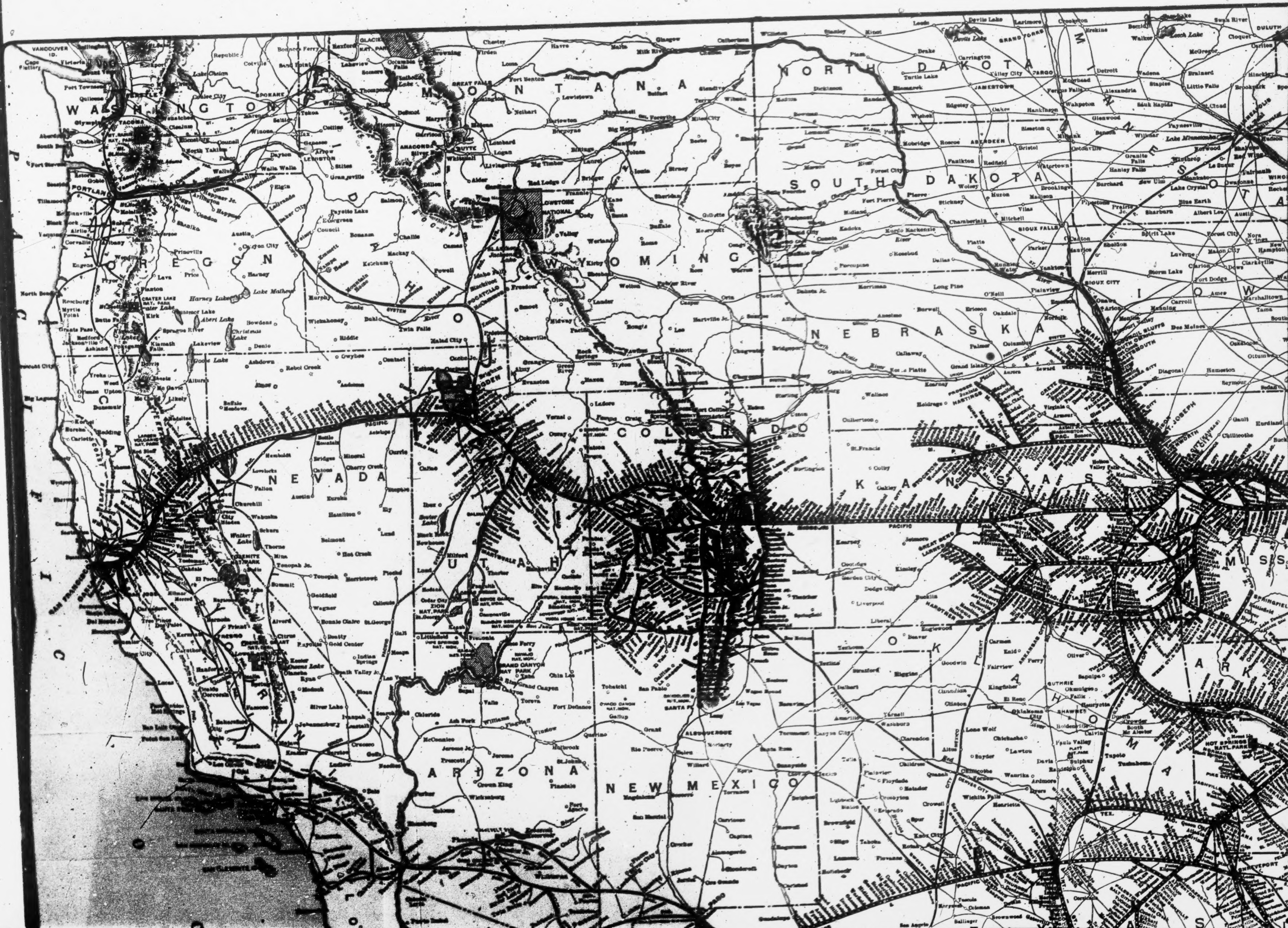
Counsel for Appellant.

MATSON, ROSS, MCCORD & CLIFFORD,
Of Counsel.



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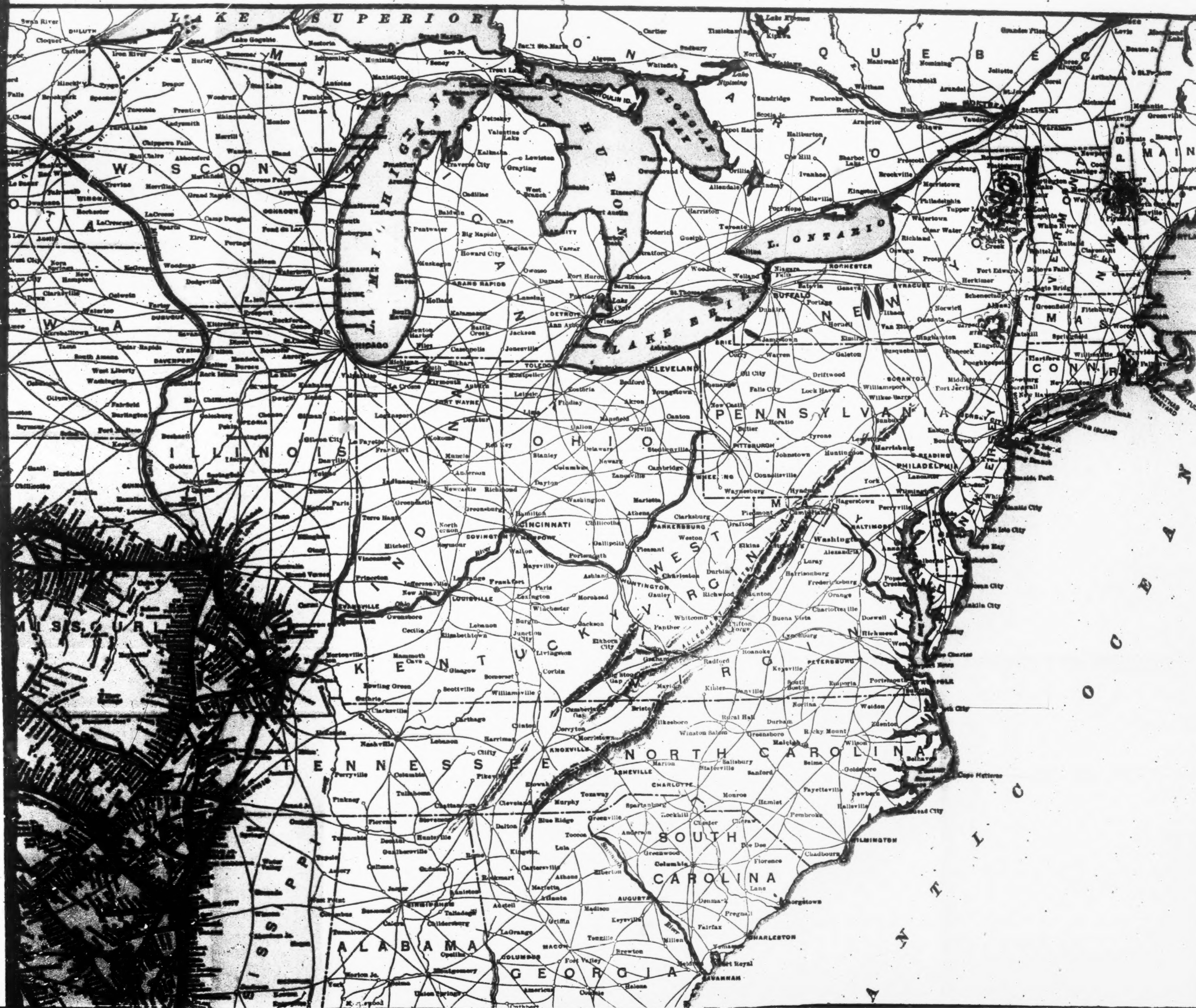
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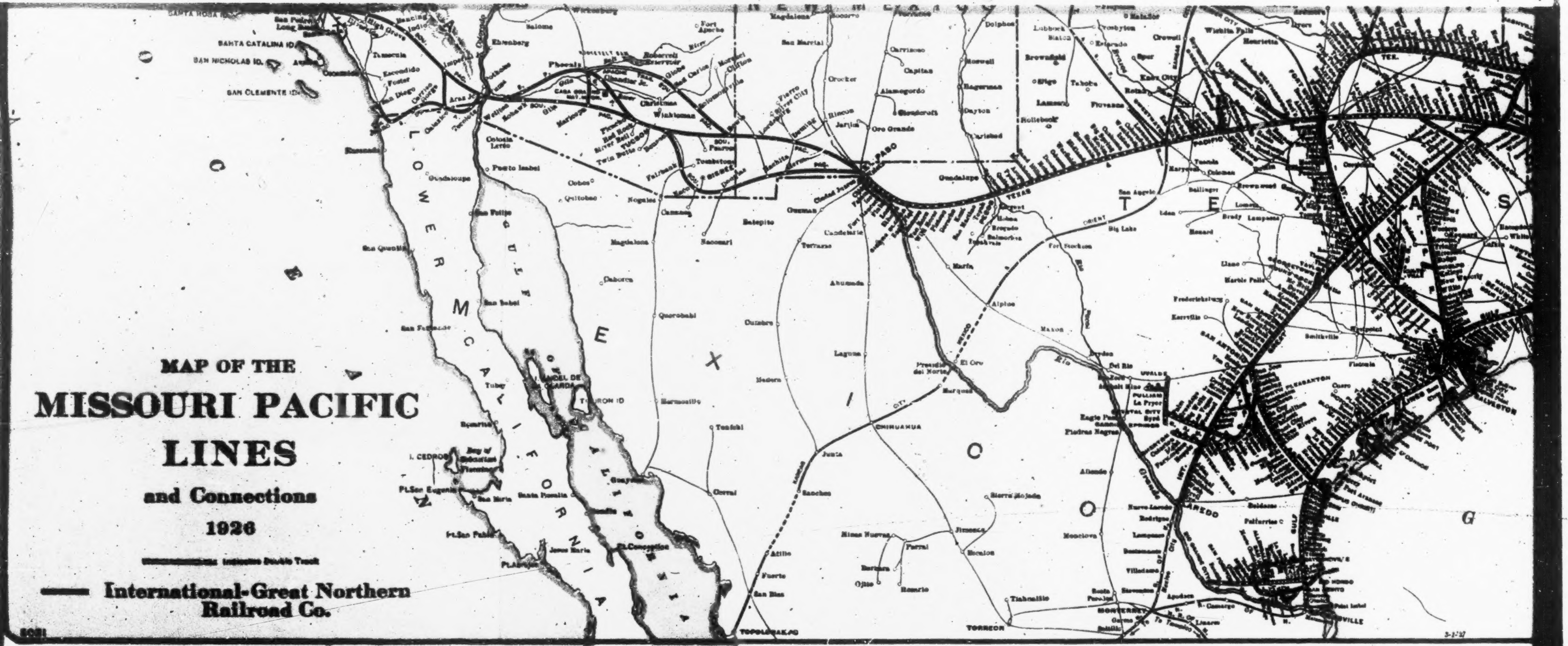
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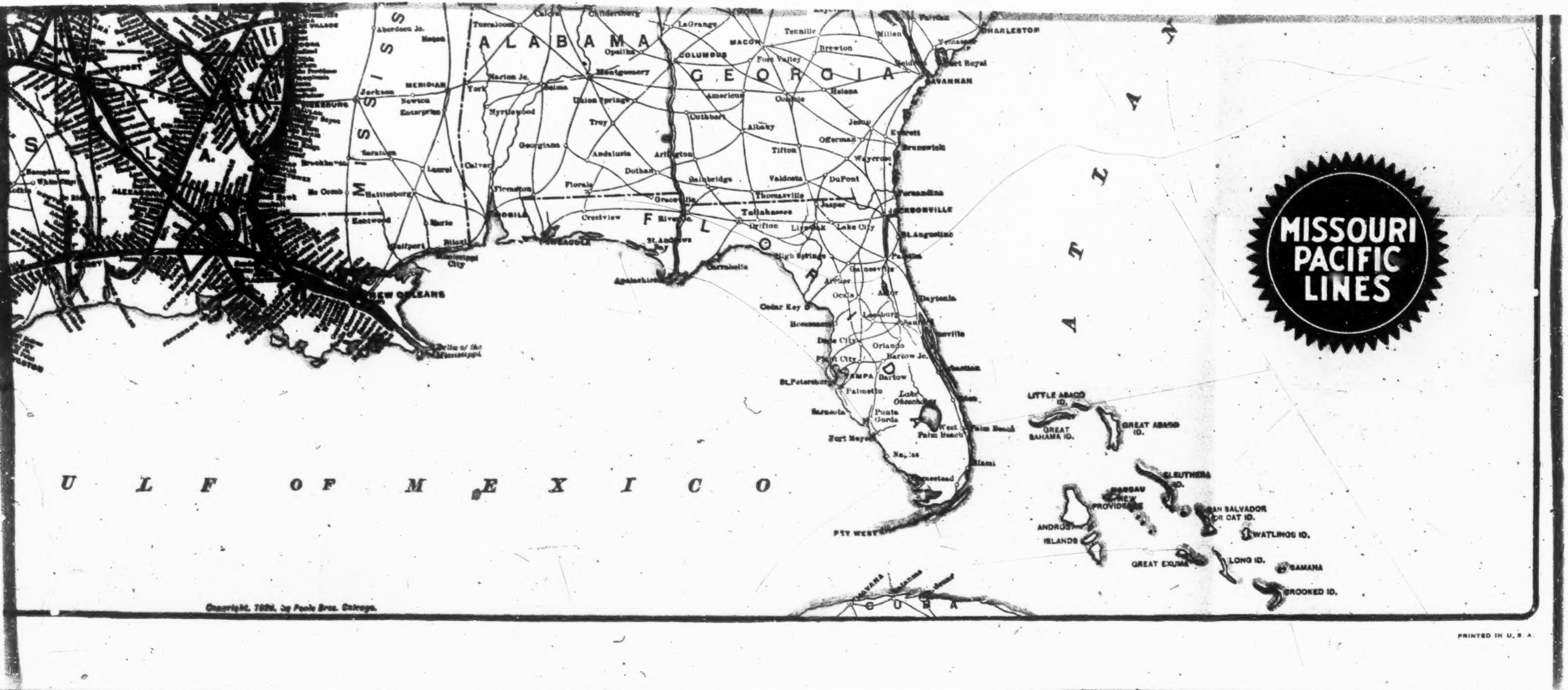

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1937

No. 641.

J. D. ADAMS MANUFACTURING COMPANY,
Appellant,

v.

WILLIAM STOREN, as Chief Administrative Officer of the Department of Treasury of the State of Indiana,
DEPARTMENT OF TREASURY OF THE STATE OF INDIANA,
PAUL V. McNUTT, WILLIAM STOREN, FLOYD E. WILLIAMSON, as and Constituting the Board of Department of Treasury of the State of Indiana,
PHILIP LUTZ, JR., as Attorney General of the State of Indiana,
Appellees.

APPEAL FROM THE SUPREME COURT OF THE STATE OF INDIANA.

APPELLEES' BRIEF.

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Note:—All italics used in quotations in this brief are ours unless otherwise stated.

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PHILIP LUTZ, JR., as Attorney General of the State of Indiana,
Appellees.

Appeal From the Supreme Court of the State of Indiana.

APPELLEES' BRIEF.

THE OPINION BELOW.

The opinion below, rendered by the Supreme Court of Indiana on April 30, 1935, is not yet officially reported. It is contained in this record at pages 43 to 60, and is reported in 7 Northeastern Reporter (Second Series), 941.

STATEMENT OF THE CASE.

This is an appeal from the judgment of the Supreme Court of the State of Indiana (R. 42 and 43) in an action originally instituted in the Marion Superior Court by the J. D. Adams Manufacturing Company, an Indiana corporation (the appellant here), seeking a declaratory judgment construing certain portions (more particularly, sections 1 (f) and 6 (a)) of Chapter 50 of the Acts of the General Assembly of Indiana of 1933 (p. 388 at pp. 389-390-392-393; 11 Burns' Indiana Statutes, 1933 Ed., secs. 64-2601 to 64-2629; Baldwin's Indiana Statutes, 1934 Ed., secs. 15,981 to 16,010).

The appeal involves two distinct questions:

The first question involved in this appeal is: Can the provisions of Chapter 50 of the Indiana Acts of 1933 (which imposes a general non-discriminatory excise upon all who are domiciled within the State of Indiana or who transact business within the state and under its protection measured by the amount of gross income) be applied to all of the gross income of the appellant (an Indiana corporation), including that portion which is received in Indiana from the sale of products manufactured in Indiana shipped from appellant's factory in Indiana to purchasers in other states and foreign countries; or is such an application of the Act prohibited by the provisions of Clause 3 of Section 8 or Section 10 of Article I of the Constitution of the United States? (R. 70.)

The second of these is: Can the provisions of Chapter 50 of the Indiana Acts of 1933 be construed to apply to that part of appellant's gross income which accrues as interest payments on municipal corporation bonds, which

were exempt from property taxation by statute, without impinging upon the prohibition of section 10 of Article I of the Federal Constitution that "no state shall * * * pass any * * * law impairing the obligation of contracts"? (R. 70-71.)

The statutes appertaining to the *first* question presented by this appeal are as follows:

Chapter 50 of the Indiana Acts of 1933, in so far as it applies to this feature of this appeal, provides as follows:

> "The term 'gross income,' except as hereinafter otherwise expressly provided, means the gross receipts of the taxpayer received as compensation for personal services, and the gross receipts of the taxpayer derived from trades, businesses or commerce, and the gross receipts proceeding or accruing from the sale of property, tangible or intangible, real or personal, or service, or any or all of the foregoing, and all receipts by reason of the investment of capital, including interest, discount, rentals, royalties, fees, commissions or other emoluments, however designated, and without any deductions on account of the costs of property sold, the cost of materials used, labor cost, interest or discount paid, or any other expense whatsoever, and without any deductions on account of losses; Provided, however, That the term 'gross income' shall not include cash discounts allowed and taken on sales; nor freight prepaid by the taxpayer and repaid to him by the purchaser; goods, wares or merchandise, or the value thereof, returned by customers when the sale price is refunded either in cash or by credit; nor the sale price of any article accepted as part payment on any new article sold, if and when the full sale price of the new article is included in the 'gross income' subject to taxation under this act; Provided, further, That 'gross income' shall include

the proceeds from the sale of any property handled on consignment by the taxpayer."

Sec. 1 (f), Chapter 50, Indiana Acts of 1933, p. 388, at pp. 389-390;

11 Burns' Indiana Statutes, 1933 Ed., 64-2601 (f);

Baldwin's Indiana Statutes, 1934 Ed., 15,981 (f).

"There is hereby imposed a tax, measured by the amount or volume of gross income, and in the amount to be determined by the application of rates on such gross income as hereinafter provided. Such tax shall be levied upon the entire gross income of all residents of the State of Indiana, and upon the gross income derived from sources within the State of Indiana, of all persons and/or companies, including banks, who are not residents of the State of Indiana, but are engaged in business in this state, or who derive gross income from sources within this state, and shall be in addition to all other taxes now or hereafter imposed with respect to particular occupations and/or activities. Said tax shall apply to, and shall be levied and collected upon, all gross incomes received on or after the first day of May, 1933, with such exceptions and limitations as may be hereinafter provided."

Sec. 2, Chapter 50, Indiana Acts of 1933, p. 388 at p. 390;

11 Burns' Indiana Statutes, 1933 Ed., 64-2602;

Baldwin's Indiana Statutes, 1934 Ed., 15,982.

"The tax hereby provided for shall be imposed at the following rates:

(a) Upon the entire gross income of every person engaged in the business of manufacturing, compounding, or preparing for sale, profit, or use, any article or articles, substance or substances, commodity or commodities; or in the business of mining and/or producing for sale, profit or commercial use any oil, natural gas, stone, coal, sand, gravel or other mineral product, or felling and producing timber, for sale, profit or commercial use; or in agriculture, including the production of live stock, poultry, eggs, or any other product of the farm, orchard, garden or greenhouse, one-fourth of one per cent."

* * * * * * *

(c) Upon the entire gross income of every person engaged in the business of retailing of any tangible commodity or commodities not specifically mentioned in subsection (d) of this section, one per cent."

* * * * * * *

Sec. 3 (a), (c), Chapter 50, Indiana Acts of 1933, p. 388 at p. 391;
11 Burns' Indiana Statutes, 1933 Ed., 64-2603 (a), (c);
Baldwin's Indiana Statutes, 1934 Ed., 15,983 (a), (c).

"There shall be excepted from the gross income taxable under this act:

'So much of such gross income as is derived from business conducted in commerce between this state and other states of the United States, or between this state and foreign countries, to the extent to which the State of Indiana is prohibited from taxing under the Constitution of the United States of America. There shall also be excepted from such

gross income, salaries, pensions, and other emoluments paid by the United States of America or any of its agencies, and interest or other earnings paid upon bonds or other securities issued by the United States of America or its agencies, to the extent that the State of Indiana is prohibited from imposing a tax upon such salaries, pensions, emoluments, interest and/or earnings, by the Constitution of the United States of America.' "

Sec. 6 (a), Chapter 50, Indiana Acts of 1933, pp. 392-393;

11 Burns' Indiana Statutes, 1933 Ed., 64-2606 (a);

Baldwin's Indiana Statutes, 1934 Ed., 15,986 (a).

The appellant is a corporation organized under the laws of the State of Indiana (R. 24), engaged in manufacturing machinery, tools, appliances, and equipment for the construction, improvement, and repair of roads and highways (R. 25). Its home office (R. 24), principal place of business (R. 24), and its only manufacturing plant (R. 24, 25) are located within the State of Indiana. Appellant sells a substantial portion of its products to purchasers within the State of Indiana (R. 28), and a substantial portion of its products, through selling agents and otherwise, to dealers in other states and foreign countries (R. 25, 26, 27). All sales made to purchasers located outside of the State of Indiana are upon orders taken subject to the approval of the home office (R. 26, 27), shipment is made from the factory (R. 26, 27, 28), and payment is made to the home office located in Indiana (R. 26, 27).

The facts have been stipulated (R. 24 to 35), and there is now no disagreement as to the amount of the tax, if any, but merely as to the validity of the application of the

Act to the specific income in question in view of the provisions of Article I, Section 8 and 10, of the Federal Constitution.

The statutes appertaining to the *second* question presented by this appeal, relating to the inclusion of interest derived from bonds exempt from property taxation in the index for the excise tax presently before the court, are:

Section 5 of Chapter 59 of the Indiana Acts of 1919 (p. 198 at pp. 199, 203); 11 Burns' Indiana Statutes, 1933 Ed., 64-201, cl. 20; Baldwin's Indiana Statutes, 1934 Ed., 15,518, cl. 20) provides:

> "Sec. 5. The following property shall be exempt from taxation:"
>
> (Then follow nineteen clauses listing specific exemptions.)
>
> "Twentieth. All bonds, notes, and other evidence of indebtedness hereafter issued by the State of Indiana or by municipal corporations within the state upon which the said state or the said municipal corporations pay interest, shall be exempt from taxation."

In the same act, section 25 of Chapter 59 of the Indiana Acts of 1919 (p. 198 at p. 210); 11 Burns' Indiana Statutes, 1933 Ed., 64-506; Baldwin's Indiana Statutes, 1934 Ed., 15,518), provides:

> "Section 25. Where bonds or stocks are now or may hereafter be exempted from taxation, the accrued interest on such bonds or dividends on such stocks shall be listed and assessed, unless otherwise exempted, without regard to the time when the same is to be paid."

Chapter 50 of the Indiana Acts of 1933, an Act of general application upon all domiciled in (or non-residents

conducting business within) Indiana, insofar as it applies to this feature of the appeal, provides as follows:

> "The term 'gross income,' except as hereinafter otherwise expressly provided, means the gross receipts of the taxpayer received as compensation for personal services, and the gross receipts of the taxpayer derived from trades, businesses or commerce, and the gross receipts proceeding or accruing from the sale of property, tangible or intangible, real or personal, or service, or any or all of the foregoing, and all receipts by reason of the investment of capital, including interest, discount, rentals, royalties, fees, commissions or other emoluments, however designated, and without any deductions on account of the costs of property sold, the cost of materials used, labor cost, interest or discount paid, or any other expense whatsoever, and without any deductions on account of losses; Provided, however, That the term 'gross income' shall not include cash discounts allowed and taken on sales, nor freight prepaid by the taxpayer and repaid to him by the purchaser; goods, wares or merchandise, or the value thereof, returned by customers when the sale price is refunded either in cash or by credit; nor the sale price of any article accepted as part payment on any new article sold, if and when the full sale price of the new article is included in the 'gross income' subject to taxation under this act; Provided, further, That 'gross income' shall include the proceeds from the sale of any property handled on consignment by the taxpayer."

Sec. 1 (f), Chapter 50, Indiana Acts of 1933, p. 388 at pp. 389-390;

11 Burns' Indiana Statutes, 1933 Ed., 64-2601 (f);

Baldwin's Indiana Statutes, 1934 Ed., 15,981 (f).

"There is hereby imposed a tax, measured by the amount or volume of gross income, and in the amount to be determined by the application of rates on such gross income as hereinafter provided. Such tax shall be levied upon the entire gross income of all residents of the State of Indiana, and upon the gross income derived from sources within the State of Indiana, of all persons and/or companies, including banks, who are not residents of the State of Indiana, but are engaged in business in this state, or who derive gross income from sources within this state, and shall be in addition to all other taxes now or hereafter imposed with respect to particular occupations and/or activities. Said tax shall apply to, and shall be levied and collected upon, all gross incomes received on or after the first day of May, 1933, with such exemptions and limitations as may be hereinafter provided."

Section 2, Chapter 50, Indiana Acts of 1933, p. 388 at p. 390;

11 Burns' Indiana Statutes, 1933 Ed., 64-2602;

Baldwin's Indiana Statutes, 1934 Ed., 15,982.

The facts having been mutually stipulated by the parties, there is now no disagreement as to the facts, the amount of the tax, if any, but merely as to the validity of the application of the Act to the income in question (R. 24 to 35, more particularly, R. 29).

The right of the State of Indiana to collect approximately $11,000,000.00 in taxes is involved in this appeal.

SUMMARY OF ARGUMENT.

PROPOSITION I.

The Tax Imposed by the Indiana Act is a Tax Upon the Receipt of Gross Income, a Privilege Tax, and Does Not Burden Interstate Commerce in the Constitutional Sense.

> "That the receipt of income by a resident of the territory of a taxing sovereignty is a taxable event is universally recognized."

State of New York ex rel. Cohn v. Graves, et al., (1937) 300 U. S. 308, 81 L. Ed. 666;
Maguire v. Trefry, (1920), 253 U. S. 12;
Lawrence v. State Board of Tax Commissioners, (1932), 286 U. S. 276.

The Supreme Court of the State of Indiana has held not only in the case at bar, but in other cases wherein the tax in question was involved, that such a tax was imposed upon the receipt of gross income, a privilege tax.

Miles, et al. v. Department of Treasury, (1935), 209 Ind. 172, 199 N. E. 372, 101 A. L. R. 1359;
Indiana Creosoting Co. v. McNutt, etc., et al., (1936), — Ind. —, 5 N. E. (2d) 310, 313;
See also: Sec. 2, Chap. 50, Indiana Acts of 1933, p. 388 at p. 390; 11 Burns' Ind. Statutes, 1933 Ed., 64-2602; Baldwin's Indiana Statutes, 1934 Ed., 15,982;
Storen v. J. D. Adams Manufacturing Co., (1937), 7 N. E. (2d) 941.

It was the purpose of the tax in question to relieve and lessen the burden of taxes in the state on tangible

property. The Supreme Court of Indiana in discussing this question says:

> "The statute was enacted concurrently with other legislation limiting levies upon property. The greater portion of the revenue raised goes back to local units of government for the maintenance of schools and other activities otherwise dependent upon property levies. Legislative history indicates that one of the purposes of the Gross Income Tax Law was to redistribute governmental burdens and relieve property of a tax burden which was thought to be too great."
>
> *Storen v. J. D. Adams Manufacturing Co.*, (1937), 7 N. E. Rep. (2nd) 941 at p. 944;
> See Limitation of Tax Levies Act; Acts of Indiana 1933, page 1085.

The law was intended to be and is general in its application and operates upon all residents of the state who receive income within its borders. This is not a tax levied on selected or special groups or enterprises. It is a general tax levied upon all persons, firms or corporations resident and/or domiciled within the State of Indiana and imposed upon the privilege of receiving income within the State, and measured by the amount of volume thereof. It was designed to lessen the burden of tax on real estate and tangible property, and to spread the tax base, to the end that all persons receiving income in the State of Indiana might be made to bear a fair portion of the costs of government, and thereby make some return to the state for the privileges afforded by the state that are incident to domicile.

The tax does not violate the Constitution of the United States by laying an illegal burden on interstate commerce and does not levy an impost or duty upon exports under either Section 8 or Section 10, of Article I of the Federal

Constitution. This is true for each of the following reasons:

First: The tax is general in its application and was adopted as a means of distributing the burden of the cost of government commonly levied on tangible property.

> *U. S. Glue Co. v. Oak Creek,* 247 U. S. 321, 329;
> *Peck & Co. v. Lowe,* 247 U. S. 165;
> *Virginia v. Imperial Coal Co.,* 293 U. S. 15;
> *Postal Telegraph Cable Co. v. Adams,* 155 U. S. 688, 696;
> *Adams Express Co. v. Ohio,* 165 U. S. 194, 220;
> *Atlantic & Pacific Telegraph Co. v. Philadelphia,* 190 U. S. 160, 163;
> *United States Express Co. v. Minnesota,* 223 U. S. 335, 344;
> *Cudahy Packing Co. v. Minnesota,* 246 U. S. 450, 453;
> *Eastern Air Transport v. Tax Commission,* 285 U. S. 147, 152.

Second: The tax imposes no direct burden on interstate commerce. It is not laid on income from exportation because of its source or in a discriminative way, but just as it is laid on other income. It is both nominally and actually a general tax. Interstate commerce is affected only incidently and indirectly in the same manner which results from the payment of property taxes or any other general contribution which a citizen makes to the cost of government.

> *Cudahy Packing Co. v. Minnesota, supra;*
> *St. Louis Southwestern Ry. Co. v. Arkansas,* 235 U. S. 350, 367;

United States Express Co. v. Minnesota, supra;
Galveston, Harrisburg & San Antonio Ry. Co. v. Texas, 210 U. S. 217;
Pullman Co. v. Richardson, 261 U. S. 330, 339;
Peck & Co. v. Lowe, 247 U. S. 165.

Third: The Act in question does not discriminate against interstate commerce. It is not a tax levied on selected enterprises engaged wholly or largely in interstate transactions, nor is there any contention that the tax imposed is not in proportion to the privilege enjoyed. The tax is general in its application and non-discriminatory in its burden. Its operation and effect is to impose a legitimate burden upon the privilege of receiving gross income within the State of Indiana and the rights attendant thereon incident to domicile within the state. It produces no direct burden on commerce and only the same kind of incidental and indirect effect is experienced as that which results from the payment of property taxes or any other general contribution to the cost of government. It, therefore, does not amount to a regulation of interstate commerce.

American Manufacturing Co. v. City of St. Louis, (1919), 250 U. S. 459, 39 Sup. Ct. 522;
Hope Natural Gas Co. v. Hall, (1927), 274 U. S. 284, 288;
Flint v. Stone Tracy Co., (1911), 220 U. S. 107;
Home Insurance Co. v. New York, (1890), 134 U. S. 594;
U. S. Express Co. v. Minnesota, (1912), 223 U. S. 335, 32 Sup. Ct. 211;
Kansas City, F. S. and N. P. Co. v. Botkin, (1916), 240 U. S. 227, 60 L. Ed. 617, 36 Sup. Ct. 261;

Hump Hairpin Manufacturing Co. v. Emmerson, (1922), 258 U. S. 290, 66 L. Ed. 622, 42 Sup. Ct. 305;

Northwestern Mutual Life Insurance Co. v. Wisconsin, (1918), 247 U. S. 132, 38 Sup. Ct. 414.

This tax law has been in operation in the State of Indiana since May, 1933. It was intended to reduce and has operated to reduce the tax burden on real estate and personal property. Approximately fourteen million dollars per year of the revenues produced from this source are returned to the school corporations of the state for the payment, in part, of teachers' salaries. The whole tax program of the State of Indiana has been influenced by the act in question. It is the duty of this Court, therefore, in passing upon the validity of this tax law, to view generally the scheme of taxation as it now exists in the State of Indiana to determine whether or not the program, as operative, imposes an undue burden upon interstate commerce.

This Court has said:

> "* * * we are to look for a practical rather than a logical or philosophical distinction"

in approaching the problems of the jurisdiction to tax as affected by the commerce clause.

Galveston, H. and S. A. Ry. v. Texas, (1908), 210 U. S. 217, 225, 227; 28 Sup. Ct. 638, 640.

Disregarding doctrinal disquisitions then, and regarding the results of the decisions, the constant controlling motive of this Court has been the proper desire to prevent states from imposing on interstate commerce any unusual or peculiar burden. Property having its situs within the taxing state is not exempted from a non-discriminatory

tax upon the property merely because such property is used in interstate commerce.

> *Pullman Palace Car Co. v. Pennsylvania,* (1891), 141 U. S. 18;
>
> *Western Union Tel. Co. v. Taggart,* (1896), 163 U. S. 1.

From these decisions—and those dealing with a *general* net income tax (*United States Glue Co. v. Oak Creek,* (1918), 247 U. S. 321, 329, 38 Sup. Ct. 499, 501); those dealing with gross receipts taxes as substitutes, in whole or in part, for taxes on property (*Maine v. Grand Trunk Ry.,* (1891), 142 U. S. 127, 12 Sup. Ct. 121; *Cudahy Packing Co. v. Minnesota,* (1918) 246 U. S. 450, 38 Sup. Ct. 373; *United States Express Co. v. Minnesota,* (1912), 223 U. S. 235, 32 Sup. Ct. 328; *Northwestern Life Insurance Co. v. Wisconsin,* (1918), 247 U. S. 132, 38 Sup. Ct. 444; *Pullman Co. v. Richardson,* (1923), 261 U. S. 330, 43 Sup. Ct. 366); those dealing with privilege taxes (*American Manufacturing Co. v. City of St. Louis,* (1919), 250 U. S. 459, 39 S. Ct. 522, 63 L. Ed. 1084; *Oliver Mining Co. v. Lord,* (1923), 262 U. S. 172, 43 Sup. Ct. 526),—it is important to recognize that the propositions announced and the results reached are based upon the premise that individuals, firms and corporations are not absolved from the payment of their proper proportion of the cost of government in the state of domicile, or the cost of government in the state in which the property is situated, merely because the person domiciled, or the owner of the property, is engaged in interstate commerce. Every individual, firm or corporation domiciled or doing business within a state is bound, upon the simplest statement of common justice, to bear its proportion of governmental expense.

Statements made by the court and relied upon by the appellant, to the effect that a tax on gross receipts is a direct burden on interstate commerce, have never been applied to a general tax. Such statements have appeared in support of a net income tax or taxes imposed upon a special group. But, even as applied to net income, economists all agree that there exists a very definite relationship between gross receipts and net profits.

> See dissenting opinion *Stewart Dry Goods Co. v. Lewis,* 294 U. S. 566.

The State of Indiana has a right to impose a tax on the privilege of receiving income as an incident to the right of domicile. The tax so imposed, measured by the amount of gross receipts, is more general in its application than any other tax now imposed. It has lessened the burden of tax on tangible property—it has imposed no direct burden on interstate commerce,—it has not discriminated against those engaged therein.

Its validity should therefore be sustained.

PROPOSITION II.

No Contract Exempting Interest Having Been Entered Into, This Tax Is Not Invalid as Impairing the Obligation of a Contract.

Statutory exemptions of property from taxation, such as the one in the instant case, are not contractual, and therefore not within the purview of section 10 of Article I of the Federal Constitution, for the reasons that: (a) in order that a state may be bound by a statutory exemption there must be a binding contract supported by considera-

tion; (b) a mere gratuity or bounty does not amount to a contract; (c) a general statutory exemption from taxation is construed to be a gratuity, and not a contract. In the instant case there was no consideration for the exemption from property taxation of the bonds held by the appellant, and hence there was no contract.

> *East Saginaw Salt Mfg. Co. v. City of East Saginaw,* (187 , 13 Wall. 373, 20 L. Ed. 611;
> *Wisconsin and Michigan Railway Co. v. Powers,* (1903), 191 U. S. 379, 48 L. Ed. 299;
> *Grand Lodge of the State of Louisiana v. City of New Orleans,* (1897), 166 U. S. 143, 41 L. Ed. 951;
> *Shiner v. Jacobs,* ( ), 62 Iowa 392, 17 N. W. 613;
> *Miller v. Hagemann,* ( ), 114 Iowa 195, 86 N. W. 281.

An exemption from taxation is never to be implied or presumed. Such an intention must be affirmatively expressed in clear and unmistakable terms.

> *Great Northern Railroad Co. v. Minnesota,* (1910), 216 U. S. 206, 221, 54 L. Ed. 446, 30 S. Ct. 344;
> *Henderson Bridge Co. v. City of Henderson,* (1899), 173 U. S. 592, 617, 618, 43 L. Ed. 823, 19 S. Ct. 553;
> *Millsaps College v. Jackson,* (1927), 275 U. S. 129, 132;
> *Hale v. Iowa State Board of Assessment and Review,* (Nov., 1937), 82 L. Ed. Advance Opinions, 66 at 70;
> *Pacific Co. v. Johnson,* (1932), 285 U. S. 480, 491, 76 L. Ed. 893, 897, 52 S. Ct. 434;

Methodist Episcopal Church v. Ellis, (1871), 38 Ind. 3, 8;

Storen, etc., et al. v. Jasper County Farm Bureau Cooperative Association, (1936), 102 Ind. App. —, 2 N. E. (2d) 432 at 434;

2 Cooley on Taxation, (4th Ed.) sec. 672, pp. 1403, 1404, 1405.

Moreover, if an exemption is found to exist, it must not be enlarged by construction, since the presumption is that the legislative body has granted in express terms all it intended to grant.

2 Cooley on Taxation, (4th Ed.), sec. 672, pp. 1408, 1409, 1410, 1411;

Ford v. Delta and Pine Land Co., (1897), 164 U. S. 662, 666, 41 L. Ed. 590, 17 Sup. Ct. 230;

Central Railroad and Banking Co. v. Wright, (1896), 164 U. S. 327, 335, 336, 41 L. Ed. 454, 17 Sup. Ct. 80.

The Indiana statute under which the exemption is claimed by the appellant applies exclusively to *general property taxes* by *its very terms,* and not to an excise tax.

Sec. 5, Chapter 59, Indiana Acts of 1919, p. 198 at 199, 203; 11 Burns' Indiana Statutes, 1933 Ed., 64-201; Baldwin's Indiana Statutes, 1934 Ed., 15,518;

See: *Hale v. Iowa State Board of Assessment and Review,* (Nov. 1937), 82 L. Ed. Advance Opinions, 66.

The statute under which appellant claims an exemption from excise taxation of the interest derived from the

ownership of bonds exempted from general property taxes contains internal positive evidence that the legislative body in granting the exemption to the bonds from the general property taxes, did not intend that the interest derived from such bonds or other evidences of indebtedness, should be accorded the same bounty.

> Section 25, Chapter 59, Acts of Indiana of 1919, p. 198 at p. 210; 11 Burns' Indiana Statutes, 1933 Ed., 64-506; Baldwin's Indiana Statutes, 1934 Ed.

A general tax upon the fruits of domicile, the receipts, custody and control of income, measured by the receipt of gross income, such as that contained in Chapter 50 of the Indiana Acts of 1933, pp. 388 to 407, is not a tax upon property but an excise tax, and the Indiana Supreme Court has so held.

> *Miles et al. v. Department of Treasury et al.*, (1935), 209 Ind. 172; 199 N. E. 372, 101 A. L. R. 1359.

People, etc., ex rel. Clyde v. Gilchrist, (1923), 262 U. S. 94, 64 L. Ed. 883, is authority for the proposition that the general tax on the fruits of domicile, i. e., the receipt, custody and control of income, imposed by the Indiana Act, measured by the receipt of gross income, does not violate the protection granted by the contract clause of section 10 of article 1 of the Federal Constitution.

The cases upon which the appellant relies, as holding that to tax the interest is to tax the bonds, are not authoritative with reference to the question presented in this appeal.

(a). Several are decisions which discuss the power

of a state to tax the federal government or its instrumentalities.

> *Northwestern Mutual Life Insurance Co. v. Wisconsin,* (1927), 275 U. S. 136;
>
> *Gillespie v. Oklahoma,* (1922), 257 U. S. 501, 66 L. Ed. 338;
>
> *Weston v. Charleston,* (1829), 27 U. S. 449.

(b). The decison of *Macallen Co. v. Massachusetts,* (1929), 279 U. S. 620, is not applicable, for the following reasons: first, the exemption statute there involved specifically exempted *persons* as well as property; second, in that instance the taxing statute, by amendment, was aimed specifically and directly at the taxing of the bonds (including United States Liberty Bonds and Federal Farm Loan Bonds with which the major portion of the decision of the court is concerned); third, The Massachusetts taxing statute construed in the *Macallen case* did not impose a general tax on domicile, nor even a general income tax, but applied only to a special tax upon business corporations; fourth, the decision was definitely influenced by the fact that the courts of Massachusetts had already rejected the contention (now adopted by a majority of states, including Indiana) that an income tax was to be classified as an excise rather than a tax on property. (To this effect see: *Opinion of Justices,* 220 Mass. 613, 624, 108 N. E. 570; 266 Mass. 583, 585, 165 N. E. 900; *Harrison v. Commissioner of Corporations and Taxation,* 272 Mass. 422, 427, 172 N. E. 605, 71 A. L. R. 677).

(c). The decision of *Macallen Co. v. Massachusetts,* (1929), 279 U. S. 620 has been substantially overruled by the decision of *Pacific Co. v. Johnson,* (1932), 285 U. S. 480, and superseded by the Memorandum opinion affirming *New York ex rel. Northern Finance Co. v. Lynch,* (1933), 290 U. S. 601, affm: 262 N. Y. 477, 188 N. E. 27.

ARGUMENT.

PROPOSITION I.

The Tax Imposed by the Indiana Act Is a Tax Upon the Receipt of Gross Income, a Privilege Tax, and Does Not Burden Interstate Commerce in a Manner Forbidden by the Constitution.

Only the Validity of the Application of the Act is Involved in This Appeal.

By the express provisions of Section 6 (a) of Chapter 50 of the Indiana Acts of 1933 there is excepted from the gross income to be used as a measure of the privilege taxed, all of that gross income derived from business conducted in commerce between the State of Indiana and other states of the United States, or between Indiana and foreign countries, to the extent to which Indiana is prohibited from taxing by virtue of the Constitution of the United States. Therefore, no question of the constitutionality of the taxing Act is before this Court. The only question presented is the application of the Act to the specified factual situation reflected by the Record in this appeal, and consequently, the question is: Can the Act include within the measure of a tax based on income received by the appellant manufacturing corporation from sales where delivery was made to purchasers in other states;—or is such an application prohibited by the provisions of section 6 (a) of the Act and by sections 8 and 10, of article 1 of the Constitution of the United States? The issue is not the constitutionality of the statute, but the constitutionality of its application to a particular state of facts.

The Receipt of Income Within a State Is a Taxable Event.

In *The State of New York ex rel. Cohn v Graves, et al.*, (1937), 300 U. S. 308, 81 L. Ed. 366, this Court said at page 312:

> "That the *receipt of income* by a resident of the territory of the taxing sovereignty *is a taxable event* is universally recognized. *Domicile itself affords a basis for such taxation.* Enjoyment of the privileges of residence in the state and the attendant right to invoke the protection of its laws are inseparable from responsibility for sharing the costs of government." (Our italics.)

Later in the course of this opinion the Court said:

> "Neither the privilege nor the burden is affected by the character of the source from which the income is derived. *For that reason income is not necessarily clothed with the tax immunity enjoyed by its source.*"

The decision in *Maguire v. Trefry,* (1920), 253 U. S. 12, established the power of a state to tax a resident beneficiary on net income received from a trust established by a Pennsylvania testator. The trustee was a Pennsylvania trust company; the trust was being administered in that state; and the trust property, the income from which was in question, consisted of bonds of non-Massachusetts debtors which were held in Pennsylvania. The tax was sustained. The reasoning found in the decision is important as furnishing a direct clue to the court's conception of the factors relevant to these jurisdictional questions. The Court adopted the view of the Massachusetts court (see 230 Mass. 503, 102 N. E. 162) that the tax was based upon the protection received from

the state by the recipient of the income in his person, in his right to receive the income, and in its enjoyment;—in fine, that it was a return for the advantages received from the state, measured by income. The tax was held to be a proper one as a return for the advantages that domicile involves and confers.

The decisions establishing the right of a docimiliary state to tax the income received by one domiciled within it are a logical development of principles established with reference to property taxation. The consideration of one case of many will indicate the fact that the later income tax cases are in keeping with this development. *Southern Pacific Co. v. Kentucky,* (1911), 222 U. S. 63, held in connection with property taxes that a domiciliary state may tax tangibles which have not acquired elsewhere what is sometimes referred to as an "actual situs" predicable upon the requisite character and presence of physical jurisdiction. The result reached in this case, and the reasoning upon which it is based, should permit a domiciliary state to tax income under similar circumstances.

Domicile itself is affirmed to constitute a basis for taxation in *Lawrence v. State Board of Tax Commission,* (1932), 286 U. S. 276, 52 Sup. Ct. 556, 76 L. Ed. 1102, 87 A. L. R. 374. This decision is particularly important because it involved income which clearly could have been taxed by the non-domiciliary state in which it was earned. The basic assumption of the opinion is that responsibility for sharing the costs of government are inseparable from the enjoyment of the privileges of residence within a state and the concomitant right to invoke the protection of its laws. The economic interest realized by the receipt

of the income or represented by the power to control it at the domicile, and the fact that it was founded on the protection afforded the recipient in his person by the taxing state was deemed an adequate basis for imposing the tax. Jurisdiction to tax receipt of income is thus made dependent on the power of the taxing state to protect the person of the recipient generally, and specifically the receipt, enjoyment and control of the income at the place of domicile. In the opinion of the Court in this case this statement of the principles there established appears at page 279:

> "The obligation of one domiciled within a state to pay taxes there, arises from the unilateral action of the state government in the exercise of the most plenary of sovereign powers, that to raise revenue to defray the expenses of government and to distribute its burdens equably among those who enjoy its benefits. Hence, domicile in itself establishes a basis for taxation. Enjoyment of the privileges of residence within the state, and the attendant right to invoke the protection of its laws, are inseparable from the responsibility for sharing the costs of government. * * *
>
> "It is enough, so far as the constitutional power of the state to levy it is concerned, that the tax is imposed by Mississippi on its own citizens with reference to the receipt and enjoyment of income derived from the conduct of business, regardless of the place where it is carried on. The tax, which is apportioned to the ability of the taxpayer to bear it, is founded upon the protection afforded to the recipient of the income by the state, in his person, in his right to receive the income, and in his enjoyment of it when received. There are rights and privileges incident to his domicile in the state and to them the economic interest realized by the receipt of income or represented by the

power to control it, bears a direct legal relationship."

The receipt of income within a state is a taxable event for the reason that the state of domicile protects by the extensive machinery of government its citizens and its corporations in the privilege of planning, producing, managing, creating, receiving, controlling and enjoying income. The conduct of the affairs of the appellant corporation under civilized rules is an exercise of the privilege of domicile within the state.

This Tax Is a Privilege Tax Imposed on the Receipt of Income.

In *Miles et al. v. Department of Treasury, etc., et al.*, (1935), 209 Ind. 172, 199 N. E. 372 at 378-379, 101 A. L. R. 1359, the Supreme Court of Indiana considered the constitutionality of Chapter 50 of the Indiana Acts of 1933 and had occasion to determine the exact nature of the Act presently before this Court. In holding that the tax was levied upon residents of the state upon the basis of the privilege of the receipt of income or domicile the Court said at page 188:

> "We conclude that the tax in question is an excise, levied upon those domiciled within the state or who derived income from sources within the state, upon the basis of the privilege of domicile or the privilege of transacting business within the state, and that the burden may reasonably be measured by the amount of income. The reasoning which justifies a tax upon the basis of domicile as readily supports and justifies a tax upon the basis of the right to receive income within, or transact business under the protection of, the state."

In 1936 the Indiana Supreme Court quoted, in its opinion in *Indiana Creosoting Co. v. McNutt, etc., et al.*, — Ind. —, 5. N. E. (2d) 310 at 313, the language from the *Miles* case which has been set forth, reaffirming its statement that the tax under consideration is a tax upon the basis of the privilege of receiving income, an incident of domicile of all residents of the State of Indiana.

Section 2 of the Act, the levying clause, levies the tax in a manner thoroughly consistent with this determination of the Supreme Court of Indiana relative to the exact nature of the tax, as witness the following pertinent excerpt:

> "Sec. 2. There is hereby imposed a tax, measured by the amount or volume of gross income, and in the amount to be determined by the application of rates on such gross income as hereinafter provided. Such tax shall be levied upon the entire gross income of all residents of the State of Indiana, and upon the gross income derived from sources within the State of Indiana, of all persons and/or companies, including banks, who are not residents of the State of Indiana, but are engaged in business in this state, or who derive gross income from sources within this state, * * *."

Sec. 2, Chap. 50, Indiana Acts of 1933, pp. 388 at 390;

11 Burns' Indiana Statutes, 1933 Ed., 64-2602;

Baldwin's Indiana Statutes, 1934 Ed., 15,982.

The express provisions of the Act in the section which levies the tax clearly indicates that the "measure" of the tax is the amount or volume of gross income received.

Likewise the title of the Act fully supports the determination of the Indiana Supreme Court as will be observed from the following:

> "An Act to provide for the raising of public revenue by imposing a tax upon the receipt of gross income to provide for the ascertainment, assessment and collection of said tax, and to provide penalties for the violation of the terms of this act, and declaring an emergency."
>
> Acts of Indiana 1933, page 388.

The Indiana Supreme Court in discussing the character of the tax involved in this appeal, in its decision in *Miles v. Department of Treasury, supra,* at page 187, said:

> "* * * The individual, as distinguished from his property, is protected in the enjoyment of the privileges of citizenship, the protection of his person, and the enjoyment of his income.
>
> "It cannot logically be said that one who engages in large enterprises, with the assurance that his rights are protected by the vast machinery of government which makes possible the conduct of affairs under civilized rules, has not enjoyed a privilege and protection, and put a burden upon the machinery of government on account of which he may be required to contribute to the governmental expense, merely because his activities did not yield him a net profit in any given period. The government must operate in years in which its citizens have not profited as well as in years in which they have. It is universally recognized that the burdens of government cannot be distributed with exact justice upon all persons and property. It is also recognized that to distribute the burden of government per capita would work an injustice upon those who are least able to pay and least able to cope with social and economic problems, in favor of those better equipped to meet social and economic problems, and who, because of their more complex activities, receive more protection from and put more burden upon the instrumentalities of government. * * *"

The Tax Is Not Upon a Selected Enterprise.

The exact character of the tax, insofar as the questions presented by the appellant manufacturing corporation on the Record are concerned, is that of a sharing of the costs of government as a return for the privileges of domicile and the receipt of gross income, including the concomitant right to protection; however, for a thorough understanding of the tax in its relation to the constitutional issue raised it is important to notice in addition its characteristics. Most fundamental of these is that the tax is not one aimed at business, or at a specified business. Neither is it a tax limited to certain types of business organizations. Its scope is general, in much the same sense that the state's *ad valorem* property taxes are general,—but to a greater degree, since gross income affords a broader base and therefore actively affects a greater number of persons. The term "general" has been used by this Court to designate systems of net income taxation which were extensive, though not universal, in that they exercised a common, public effect with relation to a majority of the individuals or companies within a state, and were not restrained or limited to a particular or specific import;—in exactly the same sense, this Act is general.

In *Miles et al. v. Department of Treasury, etc., et al.*, (1935), 209 Ind. 172, at 195, 199 N. E. 372, at 382, 101 A. L. R. 1359, it is said:

> "The law is intended to be general and to operate upon all residents of the state and all who derive revenue from sources within the state. * * *"

The tax in the instant case is not one levied only upon persons likely to be engaged in interstate commerce as were the taxes disapproved in *Galveston, H. and S. A. Ry.*

Co. v. Texas, (1908), 210 U. S. 217, 28 Sup. Ct. 638; or in *Crew Levick Co. v. Pennsylvania,* (1917), 245 U. S. 292, 38 Sup. Ct. 126; or in *Philadelphia and Southern Mail SS. Co. v. Pennsylvania,* (1887), 122 U. S. 326, 7 Sup. Ct. 1118. The Act, by its extensive application, indicates that it is not a device whereby the taxing state relieves domestic consumption, or confers on it any direct or indirect bounty, so that extra-state sources contribute more to the Indiana treasury than those whom that treasury directly serves. The decisions of this Court indicate that the extra-territorial effect of such special taxes, whether on property, franchises or privileges, is thought undue when the state of destination confines the tax to articles that come in from other states. We think that such restrained or specific taxes, limited in such a manner, would be equally undue if the state of origin were to confine its tax to articles destined for other states. Important then, is the factual observation that the tax now before this Court is not confined in either manner.

That this characteristic of being a tax general and extensive in nature, and not selective or limited, is important is indicated by the statement of Professor Thomas Reed Powell in 32 Harvard Law Review, 640:

> "All of the gross income taxes that have been declared unconstitutional have been levies on selected enterprises."

The reason for attaching special significance to the fact reported above is given by Professor Powell in the article entitled "State Income Taxes and the Commerce Clause," in 31 Yale Law Journal, 799 at 801, where he says:

> "When a statute picks out a special subject for a special tax, the object of its desire is practically certain to be forced into a generosity in excess of

> that indulged in by property and business generally. If this special subject is interstate commerce or includes interstate commerce, enterprise which straddles a state line is paying more than some or all of the enterprise that is of interest only to the taxing state. The danger that the taxing state will not heed the monition that charity beginneth at home is sufficient to justify the court in looking askance at any exaction on interstate commerce that is not certain to be matched by equivalent exactions on all local commerce.''

In the instances to which the appellant's brief refer us, it is of consequence to note that the court was not dealing with taxation that fell on all business or persons alike. It had before it the (grave possibility or) actuality of heavier burdens on interstate commerce than on other business. Where this possibility is foreclosed by general state taxation on all persons measured uniformly by all incomes received by citizens (and by all income received from business conducted within the state by non-residents), there is weighty reason for the contention that one domiciled in the state who exercises all of the major functions of domicile, —including the conducting of a complete manufacturing activity and receiving and controlling all of its income there,—should not be subsidized by an exemption from the payment of its pro rata share of the cost of government common to *all* business, merely because a part of the goods manufactured under the protection of the domiciliary state are delivered to purchasers in other states. In the instant case, the tax is not only on all business, but upon all persons domiciled within the state who derive income as the result of such domicile. The farmer, laborer, capitalist, professional man, business men of all kinds, and all persons, regardless of the activity which gives rise to the income, are equally affected.

There is No Discrimination.

Significant is it that one of the characteristics of this tax on the receipt of income is the fact that it operates upon all residents of the state, and all non-residents who derive revenue from business within the state, in exactly the same manner. The tax is measured by gross income generally; not by income from deliveries made outside of the state because of its source, but just in the same manner as the same measure is utilized with reference to one whose domicile is exercised exclusively in carrying on a purely intrastate enterprise. The rate of taxation does not vary as the result of business transactions having been completely carried out either within or without the state. In every instance, both the measure of the tax and the rate of taxation applied, will be identical in the conduct of any particular activity which is selected, regardless of whether the delivery of the goods is made to a purchaser within the boundaries of the State of Indiana, or to one located in a state other than Indiana. In the practical application of the Act we find no economic discrimination either against interstate commerce or in favor of local activities. The fact is, that the exaction sought to be made from the appellant manufacturing corporation measured by income received subsequent to delivery to another state is matched identically by an equivalent exaction on *all* local commerce.

In *Virginia v. Imperial Coal Sales, Inc.,* (1934), 293 U. S. 15, a capital tax was sustained when laid by the State of Virginia against the respondent, a (domestic) corporation having its principal office in Lynchburg, Virginia, and whose sole business was that of selling coal for foreign coal mining corporations. This Court said (at page 19):

"Property having its situs within the taxing state is not exempt from a non-discriminatory property tax merely because the property is used in interstate commerce. Corporations engaged in interstate commerce should bear their proper share of the burdens of the government under whose protection they conduct their operations, and non-discriminatory taxation of their property, although used in interstate commerce, as this Court has frequently said, affects that commerce only incidentally and is not inconsistent with the constitutional immunity from the imposition of direct burden."

In this case the Court pointed out that it was dealing with a property tax. However, the language quoted indicates clearly that the characteristic of being "non-discriminatory" is deemed one of the factors which is controlling. Of interest also is the statement that corporations engaged in interstate commerce should bear their proper share of the burdens of the government under whose protection they conduct their operations.

While the Court in *Virginia v. Imperial Coal Sales, Inc., supra,* was careful to distinguish between an ad valorem property tax and a privilege tax in relation to the question of whether the same is a burden upon interstate commerce, in the decision of *James, etc. v. The Dravo Contracting Company,* No. 3, October Term, 1937, Advance Sheets, page 13, it used the following significant language:

"The question of the taxability of a contractor upon the fruits of his services is closely analogous to that of the taxability of the property of the contractor which is used in performing the services. His earnings flow from his work; his property is employed in securing them. In both cases, the taxes increase the cost of the work and diminish his profits."

This language gives full recognition to the fact that after all a tax upon property is no less direct in its burden than is a tax upon gross receipts,—or measured by the gross receipts flowing from its use.

If there can be any reasonable doubt as to the proper inference to be drawn from the language quoted above, that doubt is removed by the Court at page 18, where it says:

> "But if it be assumed that the gross receipts tax may increase the cost to the government that fact would not invalidate the tax. With respect to that effect, a tax on the contractor's gross receipts would not differ from a tax on the contractor's property and equipment necessarily used in the performance of the contract. Concededly such a tax may validly be laid. Property taxes are naturally, as in this case, reckoned as a part of the expense of doing the work."

The accuracy of this statement cannot be successfully controverted. It follows then that a non-discriminatory general tax measured by gross income is in no different position than a non-discriminatory property tax on property utilized in interstate commerce. Since the Court has frequently said that a non-discriminatory ad valorem tax on property used in interstate commerce is not inconsistent with the constitutional immunity of such commerce from the imposition of direct burdens,

> *Virginia v. Imperial Coal Sales Co., Inc.,* (1934), 293 U.S. 15, 19,
>
> *Western Union Tel. Co. v. Taggart,* (1896), 163 U. S. 1,

the reasoning of the decision in *James, etc. v. The Dravo Contracting Company, supra,* justifies the conclusion that

a non-discriminatory tax using gross income as its measure would enjoy the same standing as an ad valorem property tax and hence could not be a direct burden in the constitutional sense.

In *Peck and Company v. Lowe,* (1918), 247 U. S. 165, 38 Sup. Ct. 432, 62 L. Ed. 1049, where the federal net Income Tax Act of October 3, 1913, was held not to impinge on clause 5 of section 9 of Article 1 of the Federal Constitution that "no tax or duty shall be laid on articles exported from any state," stress is put upon the fact that the tax questioned was "general" and upon the further fact that there was no discrimination. It is true that reference is made to the fact that the levy was upon the income net after all of the expenses were paid and losses adjusted; but it is equally true that a law which taxed the net income of persons engaged in foreign commerce, to the exclusion of all other persons, could not be upheld even if the levy were effective only after expenses were paid and losses adjusted. From this it would appear that the controlling fact was the non-discriminatory quality of the general tax. It is interesting to note the language used by the Court (247 U. S. 165 at 174):

> "The tax in question is unlike any of those heretofore condemned. It is not laid on articles in course of exportation or on anything which inherently or by the usages of commerce is embraced in exportation or any of its processes. On the contrary, it is an income tax laid generally on net incomes. And while it cannot be applied to any income which Congress has no power to tax (see *Stanton v. Baltic Mining Co., supra,* p. 113), it is both nominally and actually a general tax. It is not laid on income from exportation because of its source, or in a discriminative way, but just as it is laid on

other income. The words of the act are 'net income arising or accruing from all sources.' There is no discrimination. At most, exportation is affected only indirectly and remotely. The tax is levied after exportation is completed, after all expenses are paid and losses adjusted, and after the recipient of the income is free to use it as he chooses."

Every test which is applied to the federal income tax in the above language, excepting that implied in the words "after all expenses are paid and losses adjusted" which we have already discussed, applies equally to the situation presented in the Act under consideration. Even the statement that "the recipient of the income is free to use it as he chooses" is applicable to the case under consideration. With these facts in mind, note what the Court says at page 175:

> "Thus what is taxed—the net income—is as far removed from exportation as are articles intended for export before the exportation begins. If articles manufactured and intended for export are subject to taxation under general laws up to the time they are put in course of exportation, as we have seen they are, the conclusion is unavoidable that the net income from the venture when completed, that is to say, after the exportation and sale are fully consummated, is likewise subject to taxation under general laws."

Then note the following:

> "In that respect the status of the income is not different from that of the exported articles prior to exportation."

Surely the status of the gross receipts from the sale is no more different from that of the exported articles prior to the exportation, than is net income. The status of gross

receipts by their very nature is much more akin to the status of the exported article for the reason that the net income can by no stretch of the imagination be regarded as the value of the article prior to exportation for the purposes of taxation.

Peck and Co. v. Lowe, supra, establishes the lack of discrimination as a practical test to be utilized in determining the impact of a taxing act with reference to the Constitution.

An interesting variant of the question of the existence of actual discrimination against interstate commerce is to be noted in connection with the *Ohio Tax Cases,* (1914), 232 U. S. 576, 34 Sup. Ct. 372. Before the decision of *Galveston, H. and S. A. Ry. Co. v. Texas,* (1908), 210 U. S. 217, 28 Sup. Ct. 638, the State of Ohio had a statute under which railroads were required to pay one per cent of their gross earnings from all commerce within the state. After the *Galveston* decision, the Ohio law was amended so that the gross receipts tax was limited to intra-state receipts, but the rate on railroads was increased from one per cent to four per cent. Such an act evidences a process of artificial selection which might effectively impose discriminatory burdens on interstate commerce. The Act now before the Court is non-discriminatory in that it provides for no higher rates with reference to those most likely to engage in interstate activities than with reference to those known to conduct a purely local business.

Indiana has no monopoly, natural or artificial, upon the production of road machinery. Consumption ratios change from year to year and doubtless will continue to do so. This tax on domicile and the receipt of gross income is not aimed at the business of manufacturing

as conducted by the appellant specifically, but that particular phase of manufacture is (as indeed manufacturing of all kinds is) subsumed in a general, non-discriminatory excise upon all who are domiciled within the state, or on non-residents who carry on business within the state, and who have gross income by which the tax may be measured. Since the Supreme Court's prohibitions have been directed mainly against discrimination against interstate commerce, this Act would appear not to be in conflict with the Commerce Clause of the Constitution.

Practical, Rather Than
Philosophical, Distinctions
Are to Be Recognized.

Mr. Justice Holmes in *Galveston, H. and S. A. Ry. Co. v. Texas,* (1908), 210 U. S. 217, at 225, 227, 28 Sup. Ct. 638 at 640, invites us to look to practical distinctions:

> "It being once admitted, as of course it must be, that not every law that affects commerce among the states is a regulation of it in a constitutional sense, nice distinctions are to be expected. Regulation and commerce among the states both are practical rather than technical conceptions, and, naturally, their limits must be fixed by practical lines.
>
> "It appears sufficiently, perhaps from what has been said, that we are to look for a practical rather than a logical or philosophical distinction. The state must be allowed to tax the property and to tax it at its actual value as a going concern. On the other hand, the State cannot tax the interstate business. The two necessities hardly admit of an absolute logical reconciliation. * * *"

The method of the practical approach recommended by Mr. Justice Holmes is undoubtedly responsible for two

recent realistic utterances of this Court. The first in the subordinating of the doctrinal to the common-sense view of the situation in the following statement from *James, etc. v. The Dravo Contracting Company, supra*:

> "The question of the taxability of a contractor upon the fruits of his services is closely analogous to that of the taxability of the property of the contractor which is used in performing the services. His earnings flow from his work; his property is employed in securing them. In both cases, the taxes increase the cost of the work and diminish his profits."

* * * * * * *

> "But if it be assumed that the gross receipts tax may increase the cost to the government that fact cannot invalidate the tax. With respect to that effect, *a tax on the contractor's gross receipts would not differ from a tax on the contractor's property and equipment necessarily used in the performance of the contract.*" (Our italics.)

The other statement is from *State of New York ex rel. Cohn v. Graves et al.*, (1937), 300 U. S. 308 at 312, 313. 81 L. Ed. 666 at 670:

> "That the receipt of income by a resident of the territory of the taxing sovereignty is a taxable event is universally recognized. Domicile itself affords a basis for such taxation. Enjoyment of the privileges of residence in the state and the attendant right to invoke the protection of its laws are inseparable from responsibility for sharing the costs of government."

And later:

> "Neither the privilege nor the burden *is affected by the character of the source* from which the in-

come is derived. For that reason *income is not necessarily clothed with the tax immunity enjoyed by its source.*" (Our italics.)

In *American Manufacturing Co. v. City of St. Louis,* (1919), 250 U. S. 459, 39 Sup. Ct. 522, an ordinance imposing an excise tax upon manufacturers to be measured or ascertained by all of their gross receipts was sustained despite the fact that some of the receipts had as their source the sale of the manufactured goods in states other than Missouri. This Court applied the rule of practicability and found the burden occasioned by the tax and its measure to be "only the same kind of incidental and indirect effect as that which results from the payment of property taxes or any other and general contribution to the cost of government. Therefore, it does not amount to a regulation of interstate commerce."

The State's Entire Taxing System Is to be Taken Into Account.

This Court has said that a practical line can be drawn by taking the whole scheme of taxation of the state into account.

> *Galveston, H. and S. A. Ry. Co. v. Texas,* (1908), 210 U. S. 217, 227, 28 Sup. Ct. 638, 640.

The Supreme Court of Indiana in its opinion in this cause,

> *Storen, etc., et al. v. J. D. Adams Manufacturing Co.,* (1937), — Ind. —, 7 N. E. (2d) 941 at 950;

pointed out that this Act and the Limitation of Tax Levies Act, (Chap. 237, Indiana Acts of 1933, pp. 1085 to 1090; Burns' Indiana Statutes, 1933 Ed., 64-301 to 64-306; Baldwin's Indiana Statutes, 1934 Ed., 15,892 to 15,896; were

enacted concurrently. Obviously, the scheme was to relieve all property, including that of the appellant, from what the Legislature considered a burden that bore too heavily upon the property, and to raise a sum equivalent to the resulting loss of revenues by broadening the tax base. The purpose of imposing the tax in question then, was not to increase the aggregate sum to be raised by all taxation within the state, but merely to readjust the taxing bases so that all who received benefits or potential benefits from government might pay what the legislature deemed their just proportion of the expenses of government.

In *Postal Telegraph Cable Co. v. Adams,* (1895), 155 U. S. 688, 697, 15 Sup. Ct. 268 this Court said:

> "By whatever name the exaction may be called, *if it amounts to no more than the ordinary tax upon property or a just equivalent therefor,* ascertained by reference thereto, it is not open to attack as inconsistent with the constitution." (Our italics.)

The same principle sustains the result reached in *Maine v. Grand Trunk Ry. Co.,* (1891), 142 U. S. 217; in *Ficklen v. Shelby County Taxing District,* (1908), 145 U. S. 1-22, 28 Sup. Ct. 638; *United States Express Co. v. Minnesota,* (1912), 223 U. S. 335, 32 Sup. Ct. 328, 56 L. Ed. 459; *Cudahy Packing Co. v. Minnesota,* (1918), 246 U. S. 450, 38 Sup. Ct. 373, 62 L. Ed. 827; *Pullman Co. v. Richardson,* (1923), 261 U. S. 330, 43 Sup. Ct. 366; and specifically a consideration of the entire taxing structure of the state seems to have led to the disapproval of the tax in *Galveston, H. and S. A. Ry. Co. v. Texas, supra.*

In *Pullman Company v. Richardson,* (1923), 261 U. S. 330, 43 Sup. Ct. 366, the Court said:

> "In taxing property so situated and used a state may select and employ any appropriate means of reaching its actual or full value as part of a going concern,—such as treating the gross receipts from its use in both intrastate and interstate commerce as an index or measure of its value,—and if the means do not involve any discrimination against interstate commerce *and the tax amounts to no more than would be legitimate as an ordinary tax upon the property, valued with reference to its use, the tax is not open to attack as restraining or burdening such commerce."* (Our italics.)

In most instances the volume of gross income received bears a far closer relation to the cost of governmental supervision than does the mere possession of property or a balance at the end of the fiscal year. A general, non-discriminatory tax with a gross receipts index, is but a method of distributing the cost of government, as readily as is a general ad valorem property tax or a general tax on net income. The Supreme Court of Indiana summarized the facts applicable in the statement in *Storen v. J. D. Adams Manufacturing Co.,* (1937), — Ind. —, 7 N. E. (2d) 941 at 950:

> "* * * and, *since the total taxes collected were approximately the same as before,* it is obvious that property owners generally are paying no more in property and gross income taxes, but are paying less property taxes than formerly. It cannot be said that the tax is designed to or that it does, levy upon appellee and others engaged partly in interstate or foreign commerce more than their fair proportionate share of the expense of maintaining the government under which they conduct their business." (Our italics.)

The Tax in Question Imposes No Direct Burden on Interstate Commerce.

In view of the authorities heretofore cited, there is ample authority to support a tax in the nature of an excise upon the privilege of receiving gross income. Such a tax law enacted for the purpose of broadening the tax base and lowering the rate on tangible property being general in its application imposes no direct burden on interstate commerce.

In the case of *American Manufacturing Company v. St. Louis,* 250 U. S. 459, the city of St. Louis passed an ordinance levying against manufacturers a tax on the privilege of carrying on a business of manufacturers within the city in the amount of one dollar on each thousand dollars of sales made. In supporting this tax, the Supreme Court of the United States said:

> "We hold that the tax in question is a tax upon the privilege of pursuing the business of manufacturing these goods in the city of St. Louis; that when the goods were manufactured the obligation accrued to pay the amount of the tax represented by their production when it should be liquidated by their sale by the manufacturer; that their removal from the city of St. Louis and storage elsewhere, whether within or without the State, worked no change in this obligation; that their sale by the respondent wherever they may have been stored at the time, whether it was done through its home office in New York or the office of its factory in St. Louis, should have been reported in its return to the license collector of the city of

St. Louis and the amount included in fixing the amount payable on account of its license tax."

American Mfg. Co. v. St. Louis, 250 U. S. 459, 462.

"The city might have measured such tax by a percentage upon the value of all goods manufactured, whether they ever should come to be sold or not, and have required payment as soon as, or even before, the goods left the factory. In order to mitigate the burden, and also, perhaps, to bring merchants and manufacturers upon an equal footing in this regard, it has postponed ascertainment and payment of the tax until the manufacturer can bring the goods into market."

American Mfg. Co. v. St. Louis, 250 U. S. 459, 463, 464.

"In our opinion, the operation and effect of the taxing ordinance are to impose a legitimate burden upon the business of carrying on the manufacture of goods in the city; it produces no direct burden on commerce in the goods manufactured, whether domestic or interstate, and only the same kind of incidental and indirect effect as that which results from the payment of property taxes or any other and general contribution to the cost of government. Therefore, it does not amount to a regulation of interstate commerce."

American Mfg. Co. v. St. Louis, 250 U. S. 459, 464.

The ordinance of the city of Saint Louis imposed a tax which, compared to the tax presently before the Court, was special in that it was on a selected enterprise while the tax here is general and extensive. In other respects

the differences between the Act and the ordinance are in form and not in practical operation.

Neither was designed nor intended as a regulation of, or a tax or burden upon, interstate commerce as such. Neither was designed nor intended as a discrimination against those engaged in interstate commerce. In each instance, exactions measured by gross receipts received as the result of deliveries of the manufactured articles to purchasers in other states was matched by an identically equivalent exaction on all gross income derived from sales where delivery was made within the State. The tax imposed by the City of St. Louis in the privilege of manufacturing goods imposed no burden on interstate commerce, and the case at bar imposes no undue burden.

American Manufacturing Co. v. City of St. Louis, (1919), 250 U. S. 459, 39 Sup. Ct. 552;

Hope Natural Gas Co. v. Hall, (1927), 274 U. S. 284, 288;

Flint v. Stone Tracy Co., (1911), 230 U. S. 107;

Home Insurance Co. v. New York, (1890), 134 U. S. 594;

U. S. Express Co. v. Minnesota, (1912), 223 U. S. 335, 32 Sup. Ct. 211;

Kansas City, F. S. and N. R. Co. v. Botkin, (1916), 240 U. S. 227, 60 L. Ed. 617, 36 Sup. Ct. 261;

Hump Hairpin Manufacturing Co. v. Emmerson, (1922), 258 U. S. 290, 66 L. Ed. 622, 42 Sup. Ct. 305;

Northwestern Mutual Life Insurance Co. v. Wisconsin, (1918), 247 U. S. 132, 38 Sup. Ct. 414.

The Rule Announced in James v.
Dravo Assists in Determining This Case.

This Court has taken the position that the prohibition of taxes affecting the other sovereign member of our dual system of government to be more rigid than the restrictions upon the power of the states to impose taxes affecting interstate commerce.

> See: *Gillespie v. Oklahoma,* (1922), 257 U. S. 501, 505, 66 L. Ed. 338.

In view of the fact that the rule as to instrumentalities of the United States has been stated to be absolute in form and stricter in substance than the criteria applicable to the jurisdiction of the states to levy taxes which may in some manner affect commerce between the states, the recent decision of this Court holding a general, state-wide, non-discriminatory tax upon gross receipts (which because of the measure employed by both is similar to the tax upon domicile here questioned) was not a direct burden or encroachment upon the federal government and hence not an interference in the constitutional sense, is persuasive in establishing the principle that the tax on domicile measured by gross receipts and upon the receipt of gross income presently before this Court (which is general, state-wide, and non-discriminatory) is not a direct burden upon interstate commerce and hence not an interference with such commerce in the constitutional sense.

> See *James, etc. v. The Dravo Contracting Company,* (1937), — U. S. —, No. 3 October Term Advance Sheets page 13.

This Court in *James v. The Dravo Contracting Company, supra,* gave full recognition to the fact that after all, a tax upon property is no less direct in its burden than is a tax measured by the gross receipts flowing from its use.

> "With respect to that effect, a tax upon the contractor's gross receipts would not differ from a tax on the contractor's property and equipment necessarily used in the performance of the contract."

The Crew Levick Case Considered.

The appellant manufacturing corporation relies heavily upon certain quoted passages from the decision of this Court in *Crew Levick Co. v. Pennsylvania,* (1917), 245 U. S. 292, 38 Sup. Ct. 126, 62 L. Ed. 295. That case and the present one are readily distinguishable upon at least three important grounds: *first,* the question there presented was whether a duty was laid upon exports, or foreign commerce, contrary to the second paragraph of section 10 of article 1 of the Federal Constitution, and did not present any question under the Commerce Clause; *second,* the tax was upon a special, selected class, i. e., merchandisers,—a special class incidentally, most likely to be engaged in exporting and importing; *third,* the tax involved was *not* upon, or measured by, either gross income or gross receipts, but by an entirely distinct measure: the total volume of transactions whether income was ever realized upon the transaction or not. In essence

then, it was a selective *sales tax* upon those engaged in mercantile selling.

These distinctions are significant and should be considered further. The *first* is significant because it removes the case as an authority upon the interstate commerce question.

The *second* ground of distinction is important because the selection of the particular class most probable to be conducting foreign commerce justified the court in entertaining a suspicion that Pennsylvania intended to exact a contribution from the foreign merchandising business which was not matched by an equivalent exaction from all businesses conducted locally. In a sense, the very selection of this single, particular enterprise to be the sole object of the tax, under the peculiar circumstances of the case amounted to a form of discrimination. Under the Indiana Act every type of business, every form of business organization, every commercial enterprise is taxed, and taxed equally upon the same basis,—the generality or equality of the Act goes further than that: for not only is *all* commerce uniformly treated, but all individuals and associations even though not engaged in commercial activities are accorded a like usage. Whatever exaction results with reference to a particular type of business is matched by an equivalent exaction upon all other business, all other activities, and all other persons domiciled within the state. The factual situation is the direct antithesis of that presented in the *Crew Levick* case.

Third: In *United States Glue Company v. Town of Oak Creek*, (1918), 247 U. S. 321, 38 Sup. Ct. 499, 62

L. Ed. 1135, Ann. Cas. 1918 E, 748, this Court recognized the true nature of the tax dealt with in the *Crew Levick* case and characterized that tax as:

> "In *Crew Levick Co. v. Pennsylvania*, 245 U. S. 292, 38 S. Ct. 126, 62 L. Ed. 295, we held that a state tax upon the business of selling goods in foreign commerce, measured by a certain percentage of *the gross transactions* in such commerce, was by its necessary effect a tax upon such commerce, * * *" etc.

The Pennsylvania Act which formed the subject of the *Crew Levick* case indicated clearly that the criteria was the gross volume of business transacted as witness:

> "That . . . each retail vendor of or retail dealer in goods, wares and merchandise shall pay an annual mercantile license tax of $2, and all persons so engaged shall pay one mill additional on each dollar of the whole volume, gross, or business transacted annually. Each wholesale vendor of or wholesale dealer in goods, wares and merchandise shall pay an annual mercantile license tax of $3, and all persons so engaged shall pay one-half mill additional on each dollar of the whole volume, gross, of business transacted annually."

Whether income was ever actually realized was of no concern under the Pennsylvania Act,—the bare transaction, the naked sale, was sufficient to provoke the tax liability. The receipt, control or enjoyment of the fruits of the sale taxed were of no moment, since the tax was on the sale transaction regardless of whether any fruits were actually realized or not, and regardless of the presence or absence of any control or enjoyment of income. In essence the

Pennsylvania exaction was a *sales tax.* The tax upon domicile measured by the receipt of gross income resulting from that domicile here under scrutiny is much more than a sales tax in that it applies in a plethora of cases where there is no sale. For example, the receipt of interest, dividends, salaries, wages, commissions, income from the performance of services and contracts, are included in the index of the tax regardless of the utter absence of a sale. The *Crew Levick* decision relates to a sales tax. Such an exaction is not regarded as identical with gross income taxes, and the Supreme Court of Virginia is, therefore, representing the popular opinion when it holds that a tax on the sale is not an income tax.

> *Commonwealth v. Brown,* (1895), 91 Va. 762, 21 S. E. 357.

That the Court recognizes the difference between a sales and a gross income tax was recently indicated when this Court upheld a West Virginia tax upon occupations measured by gross income where the result was to increase the cost of the construction of a dam for the Federal government in the *James v. Dravo Contracting Company* case without feeling called upon to expressly overrule ***Indian Motorcycle Co. v. United States,*** 283 U. S. 570; ***Panhandle Oil Co. v. Knox,*** 277 U. S. 218; ***Graves v. Texas Co.,*** 298 U. S. 393,—three decisions in which the Court declared invalid a *sales tax* as applied to a vendor of goods to the other sovereign.

It is significant that the language which the appellants quote from the *Crew Levick* case and upon which they rely:

> "it operates to lay a direct burden upon every transaction in commerce by withholding, for the use of

the State, a part of every dollar received in such transactions,"

Crew Levick v. Pennsylvania, 245 U. S. 292 at 297,

is peculiarly applicable to a *sales or transaction tax;* but because the transaction is often history before any gross income is received and the bite of the tax takes effect, and indeed further because there is the distinct possibility that no income will be received, this language does not accurately describe a tax measured by the receipt of gross income. Of course this language was perfectly proper in the case which was before the Court because there the transaction or sale established the tax liability regardless of whether any income was realized or not.

That the language quoted should be limited to sales taxes is demonstrated by the fact that this Court has repeatedly indicated that there is nothing inherently bad in using gross receipts from interstate commerce as an index or measure of the value of property used in interstate commerce for the purpose of establishing a tax base if there is no discrimination against interstate commerce and the tax amounts to no more than would be legitimate as an ordinary tax upon such property.

Pullman Co. v. Richardson, (1923), 261 U. S. 330, at pp. 338, 339;

Cudahy Packing Co. v. Minnesota, (1918), 246 U. S. 450, at p. 453;

U. S. Express Co. v. Minnesota, (1912), 223 U. S. 335.

Note the language of the Court in *Pullman Co. v. Richardson,* (1923), 261 U. S. 330, at page 338, where the Court said:

> "In taxing property so situated and used a State may select and employ any appropriate means of reaching its actual or full value as part of a going concern,—such as treating the gross receipts from its use in both intrastate and interstate commerce as an index or measure of its value,—and if the means do not involve any discrimination against interstate commerce and the tax amounts to no more than what would be legitimate as an ordinary tax upon the property, valued with reference to its use, the tax is not open to attack as restraining or burdening such commerce."

Note also the language of the Court in *Cudahy Packing Co. v. Minnesota,* (1918), 246 U. S. 450, at page 453, where the Court said:

> "Of course, if it is laid on the earnings *as such,* they being derived largely from interstate commerce, it is an unconstitutional restraint or burden on such commerce and void. *Fargo v. Michigan,* 121 U. S. 230; *Philadelphia and Southern Steamship Co. v. Pennsylvania,* 122 U. S. 326; *Galveston, Harrisburg and San Antonio Ry. Co. v. Texas,* 210 U. S. 217. On the other hand, if what is done is to reach the property and not to tax the gross earnings, the *latter being taken merely as an index or measure of the value of the former, it well may be that the objection urged against the tax is untenable;* for, as this court has said, by whatever name the tax or taxes may be called that are fixed by reference to the value of the property, if they are not imposed because of its use in interstate or foreign commerce, and if they amount to no more than would be legitimate as an ordinary tax upon the property, valued

with reference to the use in which it is employed, they are not open to attack as restraining or burdening such commerce." (Our italics.)

The detailed analysis of the numerous cases cited in appellant's brief will result, we think, in unnecessarily lengthening this brief. It is sufficient to say that they fall into three general classes.

First, there are those which deal with receipts in the nature of tolls,—fares or freight charges by corporations engaged in the business of transportation or communication in interstate commerce. As to this class, *Philadelphia & S. M. S. S. Co. v. Pennsylvania,* 122 U. S. 326; *Leloup v. Port of Mobile,* 127 U. S. 640, and *Fisher's Blend Station Co. v. Tax Commission,* 297 U. S. 650, are fairly representative. It is sufficient to say as to that type or class that none of them are cases wherein the application of a general tax is considered. Moreover, under the Indiana Act, as administered, such receipts as are involved in said cases, are not made the measure of taxation.*

The cases are, therefore, not in point in any sense of the word and are not authority upon which to overthrow the Indiana Act.

The second class of cases is that class in which the court sustains a net income tax and in the course of the

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*** Regulation 140. Transportation and Communication.**

"The gross receipts derived by railroads, interurbans, pipe line, bus and truck lines from carrying charges of passengers, including Pullman service on sleeping and dining cars, freight and telephone or telegraph messages originating in the State of Indiana, the destination of which is outside of the State of Indiana on a continuous conveyance or which originated outside the State of Indiana and terminated therein, will not be included in gross income tax returns." (R. 121.)

several opinions refers to the distinction between net income taxes and gross receipts taxes. We think that we have shown that these cases are likewise not authority for the overthrow of the Indiana Act insofar as the same applies to gross receipts from interstate commerce as a measure of the tax for the reason that all of them have to do with selected special classes and are not general taxes in the sense that the Indiana tax is a general tax, and for the further reason that the distinction in such cases between a net income tax as such a measure and a gross income tax, is more theoretical than actual, it appearing that there is, in fact, a very definite relationship between gross receipts and net profits.

The third class of cases is that type which is represented by the case of *Crew Levick Co. v. Pennsylvania*, 245 U. S. 292, wherein the question was squarely before the court as applied to foreign commerce, whether a tax upon a selected group, measured by gross transactions in interstate or foreign commerce, could be sustained. This, after all, we think, can fairly be assumed to be the case principally relied upon by the appellants. It is, however, easily distinguishable from the present case as heretofore set forth.

It is not an authority for the invalidation of the Indiana tax which is a general tax directed against all residents of Indiana and others who derive gross income from business transacted in Indiana. There is in the Indiana Act no discrimination between interstate and intrastate commerce *and no discrimination with respect to the selection of the class.* All are within the class. The real reason why lack of discrimination between interstate and intrastate commerce availed nothing in the Crew Levick case was

because there was discrimination in the selection of the class. But if the latter discrimination is removed, there can be no discrimination and, therefore, no burden except the indirect burden which falls upon every other taxpayer for the support of the government.

The burden imposed by the Indiana Act, insofar as it is a burden upon interstate commerce, is clearly indirect. It is the fitting in of one of the parts of a general scheme of taxation whereby the taxpayer is required to pay his proportionate share of the costs of government and is neither aimed at nor, in fact, taxes interstate commerce as such.

PROPOSITION II.

No Contract Having Been Made by Indiana to Exempt the Interest Received by Virtue of the Ownership of Bonds Issued by Municipal Corporations, the Inclusion of Such Interest in the Determinative Index of an Excise Tax Is Not an Impairment of Contract, and Not Repugnant to Section 10 of Article 1 of the Constitution of the United States.

The Exemption Was Not Contractual.

The appellant argues that the exemption of the bonds from property taxation by the provisions of section 5 of Chapter 59 of the Indiana Acts of 1919, is contractual, and impliedly works to exempt the interest derived from such bonds from being used as an index or measure for

an excise tax. It insists that when the bonds were issued the statutes then in force with reference to exemptions became a part of a statutory contract under which the bonds were issued and purchased. We do not believe it is necessary for this Court to determine whether or not the exemption is contractual, as will be shown later in this argument. We do say, however, that we cannot agree with statement of appellant's counsel.

In *East Saginaw Salt Mfg. Co. v. City of East Saginaw*, (1871), 13 Wall. 373, 20 L. Ed. 611, there was involved the constitutionality of a statute of the State of Michigan repealing a former act of the legislature of that state which provided in substance that all companies or corporations formed or that may be formed for the purpose of boring for and manufacturing salt should be entitled to have all their property, real and personal, used for the purposes mentioned in the act, exempt from taxation for any purpose. The act also provided for the payment of a bounty of ten cents for each and every bushel of salt manufactured by any individual, company or corporation, from water obtained from boring in the State of Michigan. It was argued on behalf of the salt company that the prior act held out an inducement or offer to induce parties to embark in the business of manufacturing salt in Michigan, and when such parties did subsequently engage in that business, and actually produce and manufacture salt, the act became a contract between the state and such parties, which a subsequent legislature could not constitutionally revoke or repeal.

The Supreme Court of the United States, after stating that it was within the power of the legislature to make

a valid contract exempting certain property from taxation, held that no such contract was created by the prior statute granting the exemption under consideration in that case. The Court said there was no consideration for the contract, and that there was no obligation on any person to comply with the conditions of the law. That it was purely voluntary on the one part and therefore purely voluntary on the other part;—that is, on the part of the legislature, to continue, or not to continue the law.

The Court further stated that the case differs entirely from the case of a charter granted to a private corporation. That in the case of a charter granted, powers and privileges are conferred by the state, and that if no right to alter or repeal is reserved, stipulations as to taxation, or as to any other matter within the power of the legislature, are binding on both parties.

The Court then went on to say that the Act of the legislature there under consideration could not be interpreted on that principle. That the Act was in its nature a *general law,* regulative of the internal economy of the state. That it merely granted a gratuity or bounty, and was therefore repealable at the desire or will of the legislature.

Again in *Grand Lodge of the State of Louisiana v. City of New Orleans,* (1897), 166 U. S. 143, 41 L. Ed. 951, the United States Supreme Court considered the constitutionality of a provision of the Constitution of Louisiana. There a prior act of the legislature had exempted a certain building (naming it in the act) owned by the Grand Lodge from taxation so long as it was occupied by the Grand Lodge. Subsequent to the enactment of that statute a new constitution was adopted by the state

containing a provision exempting from taxation property of charitable institutions, provided the property so exempted was not used or leased for purposes of private or corporate profit or income. The Supreme Court of the United States held that there was no consideration for the original enactment of the legislature exempting the entire building from taxation. That it was a mere bounty or a gratuity; and notwithstanding the recipients of such gratuity or bounty may have incurred expense upon the faith of the offer, the state is not bound thereby, and a subsequent legislature might constitutionally repeal such exemption.

Again in *Wisconsin and Michigan Railway Co. v. Powers,* (1903), 191 U. S. 379, 48 L. Ed. 229, there was involved the constitutionality of an act of the State of Michigan repealing an exemption from taxation granted to the railway company by a prior act of that state, on the ground that it impaired the obligation of a statutory contract. The alleged contract levied a tax upon railroads, but provided "that the rate of taxation fixed by this Act or any other law of this state shall not apply to any railway company hereafter building and operating a line of railroad within this state north or parallel 44 of latitude, until the same has been operated for the full period of ten years, unless the gross earnings shall equal $4,000.00 per mile," etc. The railroad company later built a road north of the line designated by the statute, and its gross earnings had never equaled $4,000.00 per mile, so that it would be entitled to the exemption if the earlier statute had not been repealed. The contention of the company was that a later act of the legislature, repealing the exemption above quoted, impaired the obligation of a

statutory contract, and thus violated Article 1, Section 10, of the Constitution of the United States.

The United States Supreme Court again held the repealing statute to be valid. In passing upon the question, the Court made this pronouncement:

> "In the case at bar, of course the building and operating of the railroad was a sufficient detriment or change of position to constitute a consideration if the other elements were present. But the other elements are that the promise and the detriment are the conventional inducements each for the other. No matter what the actual motive may have been, by the express or implied terms of the supposed contract, the promise and the consideration must purport to be the motive each for the other, in whole or at least in part. It is not enough that the promise induces the detriment or that the detriment induces the promise, if the other half is wanting. If we are to deal with this proviso in a general tax law as we should deal with an alleged simple contract, while, no doubt, in some cases between private persons the above distinctions have not been kept very sharply in mind. (*Martin v. Meles,* 179 Mass. 114, 117, 60 N. E. 397), it is clear that we should require an adequate expression of an actual intent on the part of the state to set change of position against promise before we hold that it has parted with a great attribute of sovereignty beyond the right of change."

And in *Shiner v. Jacobs,* 62 Iowa 392, N. W. 613, the Iowa Supreme Court was called upon to consider the constitutionality of an Act of the legislature of that state which reduced or altered the exemption from taxation of forest trees or timber exempted under a prior statute. The plaintiff contended that after the passage of the

prior act, he had planted some forty-seven acres of forest trees, complying with the provisions of the act as to the manner of planting and the manner of cultivating. The later act, he contended, was unconstitutional because it altered the amount or extent of the exemption granted by the prior act which was held out to him as an inducement to plant forest trees. The Supreme Court of Iowa said the exemption provided was an act of general legislation, and applicable to all prairie land in the state. That every owner of land was thereby invited to devote a part of his land to the culture of forest trees. That the law was not in the nature of a contract between the state and such land owners as availed themselves of its provisions, but more in the nature of an inducement or a gratuity. The Iowa Court said it had long been well settled that where an exemption from taxation is provided by the general laws of the state, any subsequent legislature may alter or remove the exemption. The Court also cited and quoted as authority, the case of *Salt Company v. East Saginaw, supra.*

In *Miller v. Hagemann,* 114 Iowa 195, 86 N. W. 281, an Act of the legislature provided that in all cities existing under special charter, having a population of more than 10,000, whenever any real estate may by ordinance be assessed with any special tax for the improvements of streets, then such real estate, so specially assessed, and the special assessment upon which shall be paid, shall after such payment be exempted from taxation for general road or street tax which might thereafter be assessed against it. The City of Davenport enacted an ordinance providing for an exemption authorized by the state statute. Later the legislature repealed its act authorizing the

exemption. The plaintiff then commenced an action to mandamus to compel the defendant, Treasurer of the City of Davenport, to give him credit for, and mark as discharged, a charge for district road taxes in that city. Plaintiff contended that the repealing statute was unconstitutional because it impaired the obligation of a contract created by the prior Act of the legislature, and the City Ordinance passed pursuant thereto.

The Supreme Court of Iowa in holding that there was no impairment of the obligation of a contract by the enactment of the repealing statute, said:

> "The power of taxation is one of the sovereign and necessary powers of government, and, although it has finally been settled, after much contention, that this power may be limited by the granting of exemptions which will, under the provisions of the federal constitution prohibiting the impairment of contract, be irrepealable if provided for in a valid contract made by the state,—as, for instance, where they are given as an incident to a grant of land upon a consideration, or are embodied in a charter contract,—yet the presumption is against any such surrender of the power of the state, and the exemption will be deemed repealable unless it clearly appears not only that the exemption is one which might be granted under the power of the state to contract, but also that it was clearly intended to be made irrepealable. This position is tersely stated in *Bank v. Billings,* 4 Pet., 514, 561, 7 L. ed., 939, 955, as follows: 'That the taxing power is of vital importance, that it is essential to the existence of government, are truths which it cannot be necessary to affirm. It would seem that the relinquishment of such a power is never to be assumed. We will not say that a state may not relinquish it; that a consideration sufficiently valuable to induce a par-

tial release of it may not exist; but, as the whole community has a right to insist that its abandonment ought not to be presumed in a case in which the deliberate purpose of the state to abandon it does not appear'."

Further, in the opinion, the Iowa Supreme Court, in citing many authorities including *East Saginaw Salt Co. v. City of East Saginaw, supra,* and *Grand Lodge of Louisiana v. New Orleans, supra,* said:

> "It is well settled that a general exemption from taxation, not embodied in a contract, is repealable, *even though property has been acquired or expenses incurred in reliance thereon.* Such an exemption is in the nature of a bounty, and not a contract, and 'those who rely upon it must base their reliance upon the free and voluntary good faith of the legislature'."

What is the nature of the exemption granted by Section 5 of Chapter 59 of the Indiana Acts of 1919? There was no consideration for the enactments of the exemptions therein contained. Those exemptions were granted by the legislature as a mere gratuity or bounty. True it is that the appellants have invested their money in municipal bonds. The appellants were not induced to invest their money in any particular business by any promise of the legislature that such statute would never be repealed. Nor was there anything contained in any of the statutes involved which could be construed as binding upon the State of Indiana.

This Court has often said that the power of taxation is one of the sovereign and necessary powers of government, and is inherent in the state. That its abandonment will never be presumed, in view of its vital importance and its

necessity to the existence of government. There is nothing contained in the statutes here under consideration upon which this Court could say that the legislature intended to exempt such property from taxation for all time to come. Nor is there anything in the act upon which this Court could base a construction that the legislature intended to say to investors "If you will invest your money in the types of bonds stated in these statutes, the State of Indiana promises and agrees not to tax them." There is nothing in the act upon which such a promise or agreement could even be inferred or presumed to have been made by the legislature. All the legislature did was to grant an exemption to those types of bonds without any statement or explanation as to how the exemption was being granted. As stated in *Wisconsin and Michigan Railway Co. v. Powers, supra,* the legislature was not making a promise, but framing a scheme of public revenue. It announced its policy, and possibly opened a chance for benefits to those who purchased the types of bonds indicated in the various statutes, *but it did not address them, and therefore it made no promise to them.*

A reading of *all* of the clauses or paragraphs of section 5 of Chapter 59 of the Indiana Acts of 1919 reveals clearly that the General Assembly of Indiana was engaged therein in announcing its policy,—and not holding out a specific offer to a group of investors.

The Existence of a Contract
Has Not Been Conceded.

The brief of the appellant contains two erroneous statements. The first of these is that "on appeal to the Supreme Court of Indiana, the appellees in their brief as-

sumed the existence of a contract of exemption from taxation, * * *." The appellees did not in the trial Court, in the Supreme Court of Indiana, and do not now in this appeal, concede the existence of a contract to exempt the bonds in question from taxation. There is nothing contained in the record at the pages indicated by the appellants (R. 38-40) wherein any statement has been made that the appellees specifically conceded the existence of the alleged contract. Contrariwise the following statement is to be found in the record at page 39:

> "It is submitted that *no contract has been made* by the State of Indiana not to include interest from bonds of state political subdivisions in the measure of excise taxes imposed by the state."

Reference to the appellant's complaint (R. 5 and 13-14) and to the note contained immediately after the statement of "Proposition 11" (R. 38) indicates that the reason for limiting the scope of the brief filed in the Supreme Court of Indiana to the question of whether or not the income from such municipal bonds could be included in the index of the excise tax in question, was because this was the *only* item with reference to such bonds which was in controversy in the trial court.

At page 42 of the appellant's brief the following statement appears:

> "The State Supreme Court in its opinion conceded the existence of the contract. It stated: 'The bonds from which the income was received are specifically exempted from taxation . . ." (R. 46).

This statement is erroneous in that it attempts to add to the decision of the Supreme Court of Indiana. That Court merely stated that the bonds in question were spe-

cifically exempted from taxation, but did not decide whether such exemption was or was not contractual. Since the claim for exemption made by the appellant in the original complaint filed in the trial Court specifically limits its title to such exemption to the grant contained "* by the statutes of Indiana in force now and at the time of the issuance of such bonds (being section 6 of an Act entitled 'An Act concerning taxation, repealing all laws in conflict therewith and declaring an emergency,' approved March 11, 1919 as amended by Chapter 191, Acts of 1923; Section 14037 Burns' Indiana Statutes 1926). (R. 5.)"; and since the Act is one granting exemptions from ad valorem property taxes as a matter of public policy, it is to be presumed that clause 20 of the section referred to is not of a nature entirely foreign to the other clauses contained in the said section, and therefore that such clause, relating as it does to municipal bonds, is to be construed as being a grant of immunity and not as being contractual.

The Supreme Court of Indiana did not determine whether or not section 14037 of Burns' Indiana Statutes 1926 edition was, or was not, contractual in nature. We do not believe that it was necessary for the Supreme Court of Indiana to determine this question, or that it is necessary for this Court to determine this question,—as will be fully developed later in this argument. We do say, however, that we cannot ~~agree with~~ the statement of appellant's complaint that the Supreme Court conceded the existence of the contract,—or that the appellees have conceded the existence of such a contract.

The Statutory Exemption
Claimed is Applicable
Only to Property Taxation.

The language employed by the General Assembly in Chapter 59 of the Indiana Acts of 1919 specifically indicates that the exemptions granted by section 5 are to apply to property taxation. That act dealt with the general property taxing system of the state. Section five, the one upon which appellant relies, opens with the statement:

> "The following *property* shall be exempt from taxation: * * *" (Our italics.)

It is well to note that the clause of section 5 of Chapter 59 of the Indiana Acts of 1919, relied upon by the appellant manufacturing company as forming the basis of its claim of exemption of interest is clause 20. There is nothing contained in this clause or paragraph which can be construed as an exemption of the *interest* derived from the bonds which are exempted thereby. The clause appellant relies upon follows:

> "The following *property* shall be exempt from taxation: (Our italics.)
>
> (Then follow 19 clauses or paragraphs listing property exempted.)
>
> "Twentieth. All bonds, notes and other evidence of indebtedness hereafter issued by the State of Indiana or by municipal corporations within the state upon which the state or the said municipal corporations pay interest shall be exempt from taxation."

Clause 20, Sec. 5, Chap. 59, Indiana Acts of 1919, p. 198 at p. 203;
11 Burns' Indiana Statutes 1933 Ed. 64-201;
Baldwin's Indiana Statutes, 1934 Ed. 15,518.

A study of all of the provisions of Chapter 59 of the Indiana Acts of 1919 indicates clearly that it deals with ad valorem property taxation exclusively. In addition, it is significant that the State of Indiana did not have any general tax measured by income in 1919 at the time that these grants of exemption were made, and did not have such a tax for many years thereafter,—until the Act presently before this Court was passed in 1933. These factors, together with the language quoted above, indicate that the exemption bounties granted were to be limited to the general ad valorem property tax system with which Chapter 59 of the Indiana Acts of 1919 deals.

> See: *Henry O. Hale, et al., v. Iowa State Board of Assessment and Review,* (Nov. 8, 1937), — U. S. —, 82 L. Ed., Advance Opinions 66 at 71.

This Court has recently indicated that grants of exemption must be shown by the claimant to have been indisputably within the intention of the legislature at the time that the section of the statute relied upon as granting an immunity from taxation was passed. In *Hale et al. v. Iowa State Board of Assessment and Review,* (November, 1937) 82 L. Ed. Advance Opinions, 66 at 71, we find the following statement:

> "The taxpayer in *Clyde v. Gilchrist* claimed the benefit of an exemption under a statute of New York to the effect that, upon payment of a recording tax, debts and obligations, secured by mortgages of real property should be exempt from other taxation by the state and local sub-divisions. The question was whether the exemption thus accorded was applicable to an income tax enacted long afterwards. The state court ruled against the taxpayer (*People ex rel. Central Union Trust Co. v. Wendell,* 197

> App. Div. 131, 188 N. Y. S. 344; *People ex rel. Clyde v. Wendell*, 197 App. Div. 913, 187 N. Y. S. 949, 232 N. Y. 550, 134 N. E. 567), assuming the existence of a contract of exemption, but holding that it was not intended to apply to taxes upon income. This court, considering the fact that at the date of the exemption statute 'no one thought of an income tax,' and recalling that 'any contract of exemption must be shown to have been indisputably within the intention of the Legislature,' sustained the judgment of the state court. 'The conclusion does not seem to us very difficult to reach.' 262 U. S. at p. 98, 67 L. Ed. 893, 43 S. Ct. 501."

Nor can the allegation made by the appellant that the exemption granted by Sec. 14037 Burns' Indiana Statutes 1926 Edition, has a legislative history which indicates that it was, prior to 1919, a separate and distinct act, (being Ch. 179 of the Indiana Acts of 1903, p. 322) materially assist the appellant in its object of stretching the exemption granted from being a declaration of immunity from property taxation for the bonds themselves into a grant or bounty affecting the interest derived from the bonds and exempting the said interest from the impact of an excise tax measured by the receipt of gross income. The appellants have not shown, and it is submitted that they could not show, that the General Assembly of the State of Indiana of 1903 intended to grant a specific exemption from an excise upon the receipt of gross income to the interest in question. Indiana had no such tax in 1903. It had no such tax in 1919, when the legislature incorporated this section into an act granting numerous exemptions from ad valorem property taxation. No such tax was imposed in Indiana until 1933,—almost thirty years after the original passage of the section, the language of which, as con-

tained in the Acts of 1919, is relied upon by the appellant for title to the exemption claimed. It is interesting to note that the action of the General Assembly in 1919, in lumping the section referred to into Section 5 of Chapter 59 of the Indiana Acts of 1919, constituted a construction of the statute and an indication of the nature of the exemption by the legislature itself. In other words, the General Assembly, by the action taken in 1919, recognized the fact that the exemption, as originally conceived, was to apply only to ad valorem property taxes.

Legislative Intent to Treat
Interest Unlike Bonds Was Affirmatively
Expressed.

The identical act upon which the appellant manufacturing corporation bases its claim for privilege or exemption of interest contains within it internal evidence of a positive nature indicating that the General Assembly intended to, and did, treat interest separate and distinct from the bonds which it exempted;—and that this treatment was at variance with the immunity granted as a matter of state policy to the physical bonds themselves. Section 25 of the act upon which appellant relies (Chapter 59, Indiana Acts of 1919, p. 198 at p. 210) is as follows:

> "Where bonds or stocks are now or may hereafter be exempted from taxation, the accrued interest on such bonds or dividends on such stock shall be listed and assessed, unless otherwise exempted, without regard to the time when the same is to be paid."

Sec. 25, Chap. 59, Indiana Acts of 1919, p. 198 at p. 210; 11 Burns' Indiana Statutes, 1933 Ed., 64-506; Baldwin's Indiana Statutes, 1934 Ed., 15,542.

This language is plain and leaves no room for construction. The *interest* derived from bonds which the act has exempted from the ad valorem property taxation, *is expressly made subject to such taxes.* The interest is specifically and expressly removed from the exemption accorded the property represented by the bond. It is ***not*** accorded the favor, or premium, or immunity that the act extends to the bonds as property. Therefore, there is no gratuity granted which prevents the State from taxing such interest;—and even if there had been sufficient consideration to make of the exemption granted a contract, still the provisions of Section 25, quoted above, are so definite in indicating that *interest is to be taxed* that we are driven to the conclusion that *no contract* has been made by the State of Indiana not to tax interest as property, or to exclude interest in the measure of an excise tax on receipt of gross income or the fruits of domicile imposed by the state. Since *no contract existed* preventing the inclusion of the interest in the determinative index of gross income, there was no impairment of the obligation of a contract because interest was subsumed in the gross income in question.

The Act Before This Court
Imposes An Excise
And Not a Property Tax.

The Indiana Supreme Court has characterized the tax in question as an excise levied upon those domiciled or deriving income from sources within the state in the case of *Miles, et al. v. Department of Treasury* (1935), 209 Ind. 172 at 188, 199 N. E. 372 at 379:

> "We conclude that the tax in question is an excise, levied upon those domiciled within the state

or who derive income from sources within the state, upon the basis of the privilege of domicile or the privilege of transacting business within the state, and that the burden may reasonably be measured by the amount of income. The reasoning which justifies a tax upon domicile as readily supports and justifies a tax upon the basis of the right to receive income within, or transact business under the protection of, the state."

The tax is again designated as an excise, and not a property, tax in *Indiana Creosoting Co. v. McNutt, etc., et al,* — Ind. —, 5 N. E. (2d) 310 at 313, and the language set forth immediately above was again repeated.

Insofar as these decisions hold the tax in question not to be a property tax they follow the rule announced by the Indiana Appellate Court in *Owen v. Fletcher Savings and Trust Co.* (1934), 99 Ind. App. 365 at 376, 189 N. E. 173.

The opinion of the Indiana Supreme Court is in accord with that of the majority of states which have now reached the conclusion that an income tax is not a property tax.

> *State ex rel. Moon Co. v. Wisconsin Tax Comm.* (1917), 166 Wis. 287, 163 N. W. 639;
> *Young v. Illinois Athletic Club* (1923), 310 Ill. 75, 144 N. E. 369;
> *Standard Lumber Co. v. Pierce* (1924), 112 Ore. 314, 228 Pac. 812;
> *Shaffer v. Carter* (1920), 252 U. S. 37;
> *Hattiesburg Grocery Co. v. Robertson* (1921), 126 Miss. 34, 88 So. 4;

State Ex rel. Knox v. Gulf, etc., R. R. (1925) 138 Miss. 70, 104 to 689;

O'Connell v. State Board (1934), 95 Mont. 91, 25 Pac. (2d) 114;

Lawrence v. State Tax Comm. (1932), 286 U. S. 276.

Since the tax forming the subject matter of this appeal is *not* a property tax, and since the exemption granted by the provisions of Chapter 59 of the Indiana Acts of 1919, as amended, extends an immunity *only* to the general ad valorem property tax, it follows that the interest from such bonds is not exempted from the excise tax here involved.

Appellant's Claim to Exemption Rests Solely on the Provisions of Clause 20 of Sec. 5, Ch. 59, Indiana Acts of 1919.

It is important to note that the record indicates that the only claim to an exemption made by the appellant in instituting this suit was founded upon Sec. 14037, Burns' Indiana Statutes, 1926 Edition, which is Clause 20 of Section 5, Chapter 59, Indiana Acts of 1919, p. 198 at 203. (R. 5.) The bonds forming the subject matter of this demand for exemption are described in the record in the following language:

> "* * * bonds, notes and other evidence of indebtedness issued by municipal corporations within the State of Indiana; all of which bonds, notes and other evidence of indebtedness bear interest, and by the statutes of Indiana in force now and at the time of the issuance of such bonds (being Sec. 6

> of an Act entitled 'An Act Concerning Taxation, Repealing all Laws in Conflict Therewith and Declaring an Emergency, Approved March 11, 1919,' as Amended by Ch. 191, Acts of 1923; Sec. 14037 Burns' Indiana Statutes 1926) are declared to be exempt from taxation."

None of the bonds described in the footnotes numbered 23 and 24, appearing on page 45 of the Appellant's Brief, are shown by the record to have been owned by the appellant at the time of the trial, and no claim of exemption is based upon the ownership of any of such bonds. It is interesting to note that reference is made in these footnotes to county highway bonds, county library bonds and highway assessment bonds, none of which could be possibly included within the descriptive language of "bonds * * * issued by municipal corporations." It is further interesting to note that at least one type of bond described in footnote No. 24, i. e., Interstate Bridge Bonds, were the subject of legislative action exempting them from taxation in 1937, four years after the trial of this cause and the filing of the stipulation of facts appearing in the Record. The terms and exemption granted to any bond or other evidence of indebtedness not held by the appellant at the time of the trial can avail the appellant nothing in determining the scope of the exemption to be granted the appellant with respect to the bonds shown by the record to have been the subject matter of this litigation; and no exemption granted by the legislature after the trial of this cause to a type of bond not shown by the record to have been held by the appellant can be determinative in deciding whether or not the interest upon a different type of bond held by the appellant at the time of trial is or is not to be included in the index of an excise tax.

The Indiana Exemption Provision is Similar to Iowa Act Considered in Hale v. Iowa Board of Assessment, etc. (1937).

Insofar as the question is presented as to whether an exemption statute containing such language as: *"The following property shall be exempt from taxation"* (Sec. 5, Chap. 59, Indiana Acts of 1919, p. 198 at p. 199) applies to excise taxes as well as property taxes, it is well to note that this language is cognate to that used in the Iowa exemption statute reviewed in *Henry O. Hale etc. v. The Iowa State Board of Assessment and Review* (1937), 82 L. Ed., Advance Opinions 66, which was: *"The following classes of property are not to be taxed."* (Sec. 1304 of the Code of Iowa 1907.) In the case reviewed by this Court, the Iowa Supreme Court had, in a previous decision, announced that the exemption granted was to be limited to property taxes. See: 271 Northwestern Reporter 168. This construction of the Iowa exemption provision by the Iowa Supreme Court was accepted by this Court in the *Hale* decision. Because of the marked similarity of the language employed in the Indiana and Iowa acts, we will refer briefly to other decisions which have construed this provision of the Iowa act, or related or parallel provisions.

In the case of *Sioux City v. School District* (1880), 55 Iowa, 150; 7 N. W. 488, it was held that the exemption contained in Section 797 of the Code of 1873 *applied to general property taxes* and not to a special tax such as an assessment for street improvements.

In the case of *Edwards & Walsh Construction Company v. Jasper County* (1902), 117 Iowa, 305; 90 N. W. 1006, it was held that the provision of the statute which exempted the property of a county devoted entirely to public use did not apply to special assessment for street improvements, *but only to a general property tax.*

Again in *Iowa Mutual Tornado Ins. Assn. v. Gilbertson, State Treasurer, et al.* (and seventeen other cases) (1906), 129 Iowa, 658; 106 N. W. 153, The Supreme Court of Iowa said that the exemption from taxes of the property of religious, charitable and educational institutions granted under Section 1304 of the Code of 1897 (being the same as Section 6944 of the Code of 1935) did not grant an exemption from a business or license tax, *but only general property taxes.*

In *State of Iowa v. City of Des Moines, et al.* (March 17, 1936) 266 N. W. 41 (not yet reported in Iowa reports), the Supreme Court of Iowa followed its prior holdings and said that a similar exemption provision has no application to an excise tax but only to a property tax.

The Iowa Supreme Court is not the only one that has passed on this question. Numerous other states have been called upon to determine whether or not a general constitutional or statutory provision exempting property of a state, county or municipal corporation, including bonds, from taxation, applies only to general property taxes, or whether it also applies to an excise tax. Quite generally the Courts have held that such a constitutional or statutory exemption applies only to general property taxes. Some of the cases which may be relied upon in support of the proposition are:

City of Portland v. Kozer, 108 Ore. 375; 217 Pac. 833;

Crockett v. Salt Lake County, 72 Utah 337; 270 Pac. 142;

Independent School District v. Pfost, 51 Idaho 240, 4 Pac. (2d) 893; 84 A. L. R. 820;

City of Ardmore v. State of Oklahoma, 32 Pac. (2d) 728;

Oregon v. Preston, 103 Ore. 631; 206 Pac. 304;

State v. City of Sioux Falls, 60 S. Dak. 330, 244 N. W. 365;

State v. Board of Commissioners of Barton County, Kansas (1935), 51 Pac. (2d) 33.

In *Van Dyke v. Wisconsin Tax Commission* (March 5, 1935), 217 Wis., 528; 259 N. W. 700, the Supreme Court of Wisconsin had before it practically the same question with which this Court is confronted. The question was whether or not interest from county road bonds was subject to an income tax. The statute under which the bonds were issued became a law of Wisconsin on June 15, 1911. Section 1317M-12 provided as follows:

> "Any county, if its board shall so determine, may raise money for original improvement of any portion of the system of prospective highways by *issuing non-taxable*, four per cent, semi-annual interest payment bonds, running not more than ten years, and not exceeding with all other county indebtedness, the constitutional limit, the money to be expended in the respective towns in portions determined by the County Board according to Section 1317M-5; such bonds to be in such form as the State Highway Commission shall approve, and not to be sold at less than par * * *" (Our italics.)

In 1919, sweeping changes were made in the highway

laws and the section just quoted was repealed along with other laws, but was immediately re-enacted in Chapter 337 of the Acts of 1919. After the enactment of the Chapter 337 of the laws of 1911, the legislature enacted Chapter 516 exempting from taxation bonds issued by any county, town, city, village, school district, etc., in that state. Shortly after the enactment, the legislature enacted Chapter 658 of the laws of 1911 providing for an income tax. The question then was whether or not the exemptions granted by Chapters 337 and 516 of the laws of 1911 was an exemption from property tax or from all taxes.

In passing on the question, the Court made this statement:

> "It seems clear to us that at the time Chapter 337, Laws of 1911, was enacted, the only taxation to which such bonds could have been subjected was personal property taxation. Applying the reasoning here that was applied to the first contention relating to municipal bonds, and taking into consideration the fact that all of these acts were considered by the same Legislature, it seems clear that the Legislature, when it authorized the issuing by counties of nontaxable bonds, intended that such bonds should be free from personal property taxation only. Had the income tax law not been subsequently enacted, no one would contend that Chapter 337 did anything more, or was intended to do anything more, than exempt such bonds from taxation as personal property."

People v. Gilchrist,
262 U. S. 84, Sustains
Appellees' Position.

In addition to the *Hale* case, this Court has decided at least one other case which, we believe, sustains appel-

lees' contention. Although the question of interest from tax-free state bonds was not involved, yet the legal proposition there raised and decided was analogous. In that case the question was whether or not the interest from certain bonds secured by mortgages was exempt from the income tax of New York State, because of the provision in the recording statute of that state, pursuant to which statute the mortgages were recorded, that debts and obligations secured by such mortgages shall be exempt from other taxes by the state and local subdivisions. This Court, in passing upon the question held that the interest was returnable for state income tax purposes and that the mortgage recording statute granting the exemption pertained only to a tax on the bonds, and not to an income tax, saying:

> "A tax upon the individual, measured by net income, might be regarded as one step removed from a tax on the capital from which the income was derived."

Macallen v. Massachusetts,
279 U. S. 620 Is Not
Applicable.

The appellant places much reliance upon the opinion of this Court expressed in *Macallen v. Massachusetts* (1929), 279 U. S. 620, 73 L. ed. 874. There are certain noticeable distinctions between the Macallen case and the present appeal.

First. The Massachusetts statute creating the exemption involved in the *Macallen* case is introduced by the language: *"Persons and Property exempt from taxation."* The statute then reads: "Section 5. The following

property and polls shall be execept from taxation." In other words that statute exempted not only property, *but persons,* as well. The Indiana statute specifically refers to property and does not mention persons in any manner. (Our italics.)

Second. The Indiana Act contains internal evidence that interest is to be dealt with in a *wholly different manner* than the bonds as property. The interest was specifically made taxable under the Indiana Act. (See Section 25, Chapter 59, Indiana Acts of 1919, p. 198 at p. 210.)

Third. Under the Massachussetts statutes, as originally enacted, income from tax exempt securities was exempted from the tax. By the amendment which resulted in the *Macallen* case the legislature removed this exemption. The result of this amendment was to single out and to impose a tax on this interest alone. It was aimed directly at the persons holding tax free bonds. It was not a case of taxing all persons, or even all income.

Fourth. The Massachusetts taxing statute construed in the *Macallen* case did not impose a general or extensive tax upon all who were domiciled within the state or who transacted business there, but was levied selectively on business corporations alone.

Fifth. The decision of the Supreme Court in *Macallen v. Massachusetts* was definitely influenced by the construction which the highest Court of the State of Massachusetts had placed upon the Act. The Courts of Massachusetts had, prior to this case, already rejected the contention (which is now adopted by a majority of the states including Indiana) that an income tax was to be classified as an

excise rather than a tax on property. To this effect see *Opinion of Justices,* 220 Massachusetts 613, 624, 108 N. E. 570, 266 Mass. 583, 585, 165 N. E. 900; *Harrison v. Commissioner of Corporations and Taxes,* 272 Mass. 422, 427, 172 N. E. 605, 71 A. L. R. 677.

It is true that the *Macallen* case is often cited for the proposition that interest from tax free securities cannot be included in the gross income of a corporation under a statute imposing a franchise tax on a corporation, measured by its net income. That this was never the intention of the Court in the *Macallen* case is definitely and convincingly shown by a reading of the opinions in *Pacific Company v. Johnson,* 285 U. S. 480, and *Educational Films Corp. v. Ward,* 282 U. S. 379.

Northwestern Ins. Co. v. Wisconsin, 275 U. S. 136, is Not Applicable.

The appellant relies heavily upon the opinion of this Court expressed in *Northwestern Insurance Company v. Wisconsin,* (1927) 275 U. S. 136. The question of the impairment of the obligation of a contract within the purview of Section 10 of Article 1 of the Constitution was not presented in that case. That case dealt with the taxing by the State of Wisconsin of interest on bonds issued by the United States of America,—an entirely different question. For this reason the decision does not indicate the criteria to be applied in determining whether or not a state has entered a statutory contract to exempt interest from bonds; nor does the case lay down any rule applicable to the determination of the extent of immunity from taxation granted as a matter of state policy to bonds issued by its municipal subdivisions. The language of the act quoted

by the appellant at page 47 of its brief indicates very clearly that this case was decided upon the authority of *Gillespie v. Oklahoma,* 1922, 257 U. S. 491. That case announced the rule that:

> "The rule as to instrumentalities of the United States on the other hand *is absolute in form* and at least stricter in substance." (Our italics.)

The prohibition from taxing the other sovereign member of our dual system of Government must be, and is, rigid. For this reason, and in view of the fact that a contract to exempt interest was never entered into by the State of Indiana, it is apparent that the *Northwestern Insurance Co. v. Wisconsin* decision, while authoritative in establishing the absolute immunity of Federal bonds and their interest from taxes, is not applicable to the facts presented by the record in this appeal.

No Contractual Inhibition to Exclude Interest Existed at the Time of this Trial.

The attention of the Court is directed to the fact that the appellant in the complaint filed in the Marion Superior Court rested its claim to exemption upon the provisions of section 14037 Burns' Indiana Statutes 1926 Edition (now contained in 11 Burns' Indiana Statutes, 1933 ed. 64-201). (R. 5.) It is significant that the section relied upon by the appellant opens with the following language:

> "The following *property* shall be exempted from taxation." (Our italics.)

In the same act containing the section upon which appellant relies, we find internal evidence of a positive

nature indicating that the General Assembly intended to, and did, treat the interest derived from bonds in a wholly separate and distinct manner from the bonds which that act exempted. In other words, in the same act, we find a section which indicates that the immunity granted as a matter of state policy to the physical bonds themselves is not, upon any consideration, to be extended to the interest derived from such bonds. Section 25 of the Act upon which appellant relies is as follows:

> "Where bonds or stocks are now or may hereafter be exempted from taxation, *the accrued interest on such bonds or dividends on such stock shall be listed and assessed,* unless otherwise exempted, without regard to the time when the same is to be paid." (Our italics.)

Sec. 25, Chap. 59, Indiana Acts of 1919, p. 198 at p. 210; 11 Burns' Indiana Statutes, 1933 Ed., 64-506; Baldwin's Indiana Statutes, 1934 Ed., 15,542.

CONCLUSION.

In view of the foregoing, the decision of the Supreme Court of the State of Indiana should be affirmed.

Respectfully submitted,

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February 28, 1938.

APPENDIX "A"

Chapter 50, Acts of Indiana General Assembly, 1933,
Acts of 1933, p. 388.

AN ACT to provide for the raising of public revenue by imposing a tax upon the receipt of gross income, to provide for the ascertainment, assessment and collection of said tax, and to provide penalties for the violation of the terms of this act, and declaring an emergency. (H. 513. Approved February 27, 1933.)

Section 1. *Be it enacted by the general assembly of the State of Indiana,* That this act may be cited as the "Gross Income Tax Act of 1933."

(a) When used in this act, the term "person" or the term "company" herein used interchangeably, includes any individual, firm, copartnership, joint venture, association, corporation, municipal corporation, estate, trust, or any other group or combination acting as a unit, and the plural as well as the singular number, unless the intention to give a more limited meaning is disclosed by the context. * * *

* * * (f) The term "gross income," except as hereinafter otherwise expressly provided, means the gross receipts of the taxpayer received as compensation for personal services, and the gross receipts of the taxpayer derived from trades, businesses or commerce, and the gross receipts proceeding or accruing from the sale of property, tangible or intangible, real or personal, or service, or any or all of the foregoing, and all receipts by reason of the

investment of capital, including interest, discount, rentals, royalties, fees, commissions or other emoluments, however designated, and without any deductions on account of the costs of property sold, the cost of materials used, labor cost, interest or discount paid, or any other expense whatsoever, and without any deductions on account of losses; *Provided, however,* That the term "gross income" shall not include cash discounts allowed and taken on sales; nor freight prepaid by the taxpayer and repaid to him by the purchaser; goods, wares or merchandise, or the value thereof, returned by customers when the sale price is refunded either in cash or by credit; nor the sale price of any article accepted as part payment on any new article sold, if and when the full sale price of the new article is included in the "gross income" subject to taxation under this act; *Provided, further,* That "gross income" shall include the proceeds from the sale of any property handled on consignment by the taxpayer * * *

* * * Sec. 2. There is hereby imposed a tax, measured by the amount or volume of gross income, and in the amount to be determined by the application of rates on such gross income as hereinafter provided. Such tax shall be levied upon the entire gross income of all residents of the State of Indiana, and upon the gross income derived from sources within the State of Indiana, of all persons and/or companies, including banks, who are not residents of the State of Indiana, but are engaged in business in this state, or who derive gross income from sources within this state, and shall be in addition to all other taxes now or hereafter imposed with respect to particular occupations and/or activities. Said tax shall apply to, and shall be levied and collected upon, all gross incomes received on

or after the first day of May, 1933, with such exceptions and limitations as may be hereinafter provided.

Sec. 3. The tax hereby provided for shall be imposed at the following rates:

(a) Upon the entire gross income of every person engaged in the business of manufacturing, compounding, or preparing for sale, profit, or use, any article or articles, substance or substances, commodity or commodities; or in the business of mining and/or producing for sale, profit, or commercial use any oil, natural gas, stone, coal, sand, gravel or other mineral product, or felling and producing timber, for sale, profit or commercial use; or in agriculture, including the production of live stock, poultry, eggs, or any other product of the farm, orchard, garden or greenhouse, one-fourth of one per cent.

(b) Upon the entire gross income of every person engaged in the business of wholesaling and/or jobbing tangible commodities not specifically mentioned in subsection (d) of this section, one-fourth of one per cent.

(c) Upon the entire gross income of every person engaged in the business of retailing of any tangible commodity or commodities not specifically mentioned in subsection (d) of this section, one per cent.

(d) Upon the entire gross income of every person engaged in the business of producing, transmitting, wholesaling and/or retailing electrical energy; or producing, transporting, wholesaling and/or retailing artificial gas, or mixtures of artificial and natural gas; operating a steam and/or electric railway, street car line, motor vehicle, steam or motor boat, or any other vehicle for the transportation of freight, express and/or passengers for hire;

operating a pipe line for the transportation of any commodity for hire; operating any telephone and/or telegraph line; operating any water or sewerage system; or operating any other utility not expressly provided for elsewhere, one per cent.

(e) Upon the entire gross income of every person engaged in the business of operating any bank, trust company, building and loan association, insurance or casualty company, finance company, small loan company, or any other business of a similar nature, one per cent.

(f) Upon the gross income of every person engaged in any business or activity not enumerated in subsections (a) to (e) inclusive, of this section, including, but not in limitation of the foregoing, the gross income from professional services, personal services, sales of real estate, all funds received for the performance of contracts, all funds from the investment of capital, and all receipts from any source whatsoever, one per cent. * * *

* * * Sec. 6. There shall be excepted from the gross income taxable under this act:

(a) So much of such gross income as is derived from business conducted in commerce between this state and other states of the United States, or between this state and foreign countries, to the extent to which the State of Indiana is prohibited from taxing under the Constitution of the United States of America. There shall also be excepted from such gross income, salaries, pensions, and other emoluments paid by the United States of America or any of its agencies, and interest or other earnings paid upon bonds or other securities issued by the United States of America or its agencies, to the extent that the State of Indiana is prohibited from imposing a tax upon

such salaries, pensions, emoluments, interest, and/or earnings, by the Constitution of the United States of America.

(b) All taxes received or collected by the taxpayer as agent for the State of Indiana and/or the United States of America.

(c) So much of such gross income as is derived from sales to the United States government, its departments, or agencies, to the extent to which the State of Indiana is prohibited from taxing under the Constitution of the United States of America.

(d) Amounts received under life insurance policies and contracts paid by reason of the death of the insured.

(e) Amounts received, other than amounts paid by reason of the death of the insured, under life insurance endowment or annuity contracts, either during the term, or at maturity, or upon surrender of the contract, but in no case in excess of the total amount of the premiums paid upon such contracts. * * *

* * * Sec. 15. The tax imposed by this act shall be in addition to all other licenses and taxes imposed by law as a condition precedent to engaging in any business taxable hereunder, except as in this act otherwise specifically provided. But no municipality shall be authorized to levy any tax by virtue of the provisions of this act. * * *

* * * Sec. 29. If any clause, sentence, paragraph or part of this act shall for any reason be adjudged to be invalid, by any court of competent jurisdiction, such judgment shall not affect, impair, or invalidate the remainder of this act, but shall be confined in its operation to the clause, sentence, paragraph, or part thereof directly involved in the controversy in which such judgment shall have been rendered.

APPENDIX "B"

Burns' Indiana Statutes Annotated, 1926 Ed., Sec. 14-037.

Burns' Indiana Statutes Annotated, 1933 Ed., Sec. 64-201.

"The following property shall be exempt from taxation:"

(Then follow nineteen clauses enumerating specific exemptions.)

"Twentieth. All bonds, notes and other evidence of indebtedness hereafter issued by the State of Indiana or by municipal corporations within the state upon which the said state or the said municipal corporations pay interest shall be exempt from taxation.

Twenty-first. All bonds hereafter authorized by any county or township in the state of Indiana for the purpose of building, constructing and paying for the construction of any free gravel, macadamized or other improved roads, shall be exempt from taxation: Provided, Said bonds shall not bear a greater rate of interest than five (5) per cent interest per annum, payable semiannually.

Twenty-second. All bonds and other evidences of indebtedness hereafter issued by or in the name of any municipality or other political or civil subdivision of the State of Indiana, or by or in the name of any taxing district in the State of Indiana, for the purpose of paying the cost of acquisition, construction, improvement or maintenance of streets, highways, drains, levees, parks, docks, waterways, boulevards, playgrounds, bridges, sewage-disposal plants and other improvements of public benefit

and which bonds or other evidences of indebtedness are payable from special assessments or special taxes, shall be exempt from taxation, unless otherwise expressly provided in this section.

Twenty-three. All property both real and personal and all bonds, notes, mortgages and other evidence of indebtedness heretofore or hereafter issued and negotiated by the Indiana state board of agriculture pursuant to the provisions of any statute shall be exempt from taxation.

Twenty-fourth. All real estate and personal property used exclusively by the Indiana national guard or any other military organization of the state for armory purposes, shall be exempt from taxation so long as the same is used exclusively for such purposes.

Twenty-fifth. All property whether real or personal owned or held for the use of corporations, not for profit, which are organized for the purpose of discovering and preventing fires and saving property and life from conflagration.

Twenty-sixth. All annuities payable by religious or charitable organizations, or by educational institutions located in this state, to any person or persons who have made gifts, bequests or devises to any such organization or institution and which shall have been accepted for the purposes of such organization or institution under the provisions of any law of this state. (Acts 1919, ch. 59, 5, p. 198; 1920 (Spec. Sess.) ch. 49, 1, p. 164; 1921, ch. 222, 6, p. 638; 1923, ch. 191, 1, p. 558.)

Burns' Indiana Statutes Annotated, 1926 Ed., Sec. 14-065.

Burns' Indiana Statutes Annotated, 1933 Ed., Sec. 64-506.

"Where bonds or stocks are now or may hereafter be exempted from taxation, the accrued interest on such bonds or dividends on such stocks shall be listed and assessed, unless otherwise exempted, without regard to the time when the same is to be paid.". (Acts 1919, ch. 59, sec. 25, p. 198.)

APPENDIX "C"

CHAPTER 237.

AN ACT relating to tax levies and providing for the fixing thereof, limiting the amount of the same and repealing all laws in conflict therewith, and declaring an emergency.

[S. 319. Approved March 9, 1933.]

SECTION 1. *Be it enacted by the general assembly of the State of Indiana,* That the total of all tax levies whether fixed by the state board of tax commissioners or by statute from which any revenue shall accrue or be paid to the state treasury for any purpose or for the use of any fund kept or received by the treasurer of state, for the year 1933, upon which taxes are payable in the year 1934 and for each year thereafter shall not exceed the sum of fifteen cents upon each one hundred dollars of taxable property within said state.

SEC. 2. The term municipal corporation, as used herein shall include counties, townships, school townships, cities, school cities, towns, school towns, school districts, sanitary districts, park districts and all taxing units within the state.

SEC. 3. The total of all tax levies on property within any municipal corporation for all municipal corporations for which the property therein is taxable, except as provided in section 4 of this act, shall not exceed the following total rates:

In territory outside of the corporate limits of incorporated cities and towns, the total tax rate for all purposes, including the state levy referred to in section 1 of this act, shall not exceed one dollar on each one hundred dollars of taxable property therein.

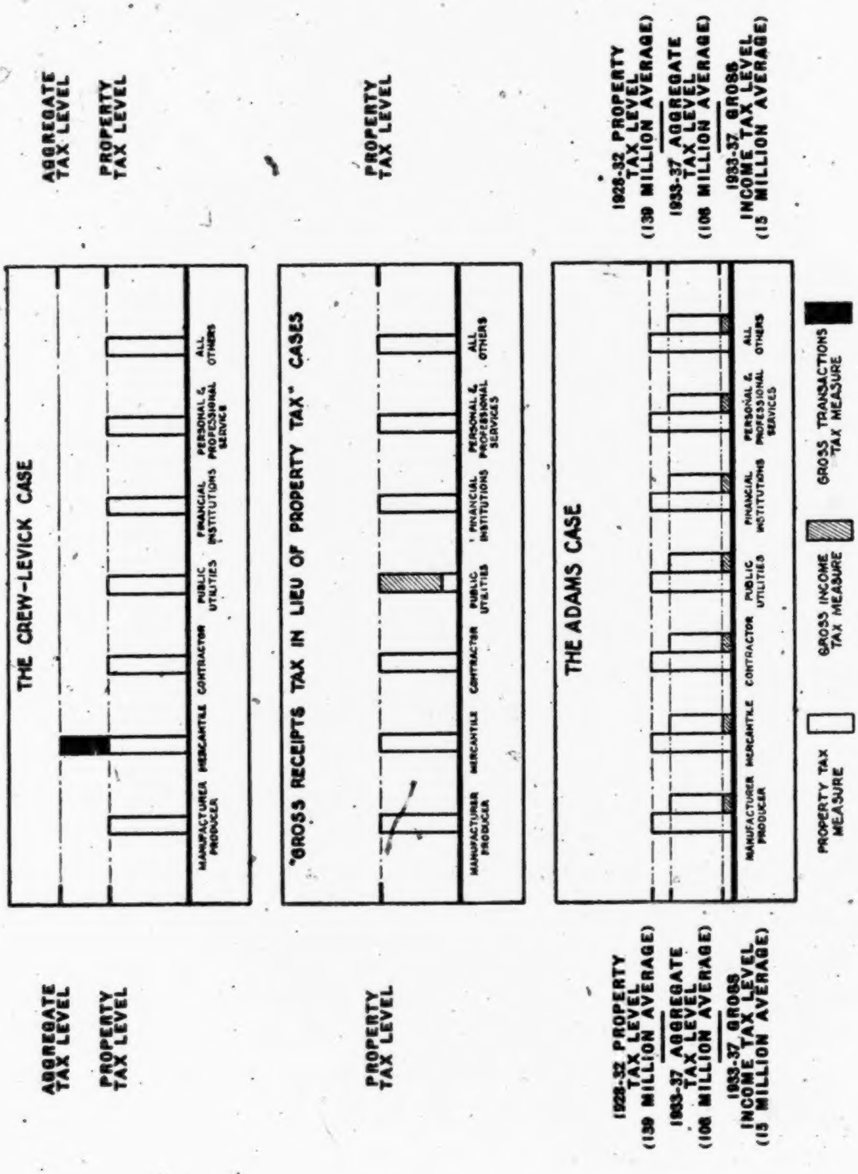
In territory inside of the corporate limits of incorporated cities and towns, the total tax rate for all purposes, including the state levy referred to in section 1 of this act, shall not exceed one dollar and fifty cents on each one hundred dollars of taxable property therein.

* * * * * * * *

Acts of Indiana, 1933, page 1085.

APPENDIX "D"

This graph is merely illustrative of certain phases of Appellee's argument.



APPENDIX "E"

TOTAL TAXES COLLECTED

BY

THE STATE, COUNTIES, TOWNSHIPS, CITIES, TOWNS AND SCHOOL CORPORATIONS OF THE STATE OF INDIANA

	Fiscal Year 1928-1929 Ending 9/30	*Fiscal Year 1929-1930 Ending 9/30*	*Fiscal Year 1930-1931 Ending 9/30*	*Fiscal Year 1931-1932 Ending 9/30*	*Sept. 30, 1932 June 30, 1933 (9 months)**	*Fiscal Year 1933-1934 Ending 6/30*	*Fiscal Year 1934-1935 Ending 6/30*	*Fiscal Year 1935-1936 Ending 6/30*	*Fiscal Year 1936-1937 Ending 6/30*	*TOTAL*
Taxes on Property	$136,451,643.17	$144,149,820.78	$143,438,784.71	$135,421,445.18	$112,386,878.08	$ 87,437,220.88	$ 95,575,961.18	$ 93,145,960.32	$ 99,688,926.18	$1,047,696,640.48
Poll Taxes	1,394,173.07	1,328,976.96	1,275,224.62	1,435,463.46	1,257,822.01	1,412,527.60	1,487,443.14	1,572,426.55	1,636,256.51	12,800,313.92
Insurance Taxes	1,991,437.81	2,089,566.90	1,843,382.49	1,738,769.24	773,881.43	1,467,895.59	1,703,149.78	1,895,373.26	1,913,812.34	15,417,268.84
Transportation Taxes	94,885.25	83,464.90	83,211.40	75,224.21	67,938.60	62,027.64	62,992.44	59,045.72	59,000.50	647,790.66
Vessel Tonnage Taxes	1,349.63	1,209.87	1,112.58	1,231.80	711.51	3,498.83	2,348.75	2,039.97	3,126.76	16,629.70
Dog Taxes	408,024.12	423,340.90	422,971.59	415,164.12	357,037.03	346,558.94	378,515.81	397,441.61	304,719.23	3,453,773.35
Inheritance Taxes	1,213,049.59	1,450,554.80	1,943,491.59	2,090,229.95	687,710.75	788,159.26	1,190,087.15	1,081,308.86	1,239,027.27	11,683,619.22
Gasoline Taxes	14,033,741.01	16,832,447.88	17,828,025.59	17,166,160.27	11,405,452.90	16,841,584.73	17,790,821.41	19,760,704.90	22,131,786.17	153,790,724.86
Excise Taxes					1,032,372.98	2,673,963.18	2,238,815.75	3,501,878.39	4,491,547.19	13,938,577.49
Intangibles					633,889.67	1,284,360.66	1,085,571.21	1,326,704.97	1,507,312.42	5,837,838.93
Motor Vehicle Weight Tax						40,620.65	29,164.81	667,899.79	510,528.01	1,248,213.26
Gross Income Tax						10,388,014.99	13,607,836.05	16,548,477.91	20,556,656.33	61,100,985.28
TOTAL	$155,588,303.65	$166,359,382.99	$166,836,204.57	$158,343,688.23	$128,603,694.96	$122,746,432.95	$135,152,707.48	$139,959,262.25	$154,042,698.91	$1,327,632,375.99

* State Fiscal year changed from October 1, to Sept. 30 to July 1, to June 30.

FILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1937

No. 641

J. D. ADAMS MANUFACTURING COMPANY - Appellant,

v.

WILLIAM STOREN, as Chief Administrative Officer of the Department of Treasury of the State of Indiana,

DEPARTMENT OF TREASURY OF THE STATE OF INDIANA,

PAUL V. McNUTT, WILLIAM STOREN, FLOYD E. WILLIAMSON, as and Constituting the Board of Department of Treasury of the State of Indiana,

PHILIP LUTZ, JR., as Attorney General of the State of Indiana - - - - - - - - - - - - Appellees.

APPEAL FROM THE SUPREME COURT OF THE STATE OF INDIANA.

Wm. B. Burford Printing Co., Indianapolis

IN THE

Supreme Court of the United States

OCTOBER TERM, 1937

No. 641

J. D. ADAMS MANUFACTURING COMPANY - Appellant,

v.

WILLIAM STOREN, as Chief Administrative Officer of the Department of Treasury of the State of Indiana,

DEPARTMENT OF TREASURY OF THE STATE OF INDIANA,

PAUL V. McNUTT, WILLIAM STOREN, FLOYD E. WILLIAMSON, as and Constituting the Board of Department of Treasury of the State of Indiana,

PHILIP LUTZ, JR., as Attorney General of the State of Indiana - - - - - - - - - - - - Appellees.

APPEAL FROM THE SUPREME COURT OF THE STATE OF INDIANA

SUMMARY OF ARGUMENT

In the consideration of this case, I think it is of the utmost importance that it be kept in mind—

First, that appellant is a corporation domestic to Indiana engaged in the business of manufacturing, whose sole factory is in Indianapolis, Indiana, and that the gross

receipts, insofar as the same are involved in this appeal, were all received at its Home Office in Indiana and that its shipments were from its factory in said State and upon orders taken subject to the approval of the Home Office in Indiana.

R., 24 and 25; also R., 26, 27 and 28.

Second, that the tax is a general tax not only from the standpoint of the taxpayer, but also from the standpoint of the gross receipts which are used as a measure of the tax.

Section 2 of Act, Appellees' Brief, page 4, also page 84;
Title of Act, page 83, of Appellees' Brief;
Section 1 (f) of Act, Appellees' Brief, page 83.

Third, that while the tax is nominally in addition to other taxes, it is in fact in lieu of the general property levy to the extent of the amount of the tax, and that the question now under consideration is limited to the application of the tax to appellant under the facts already stated.

APPELLEES' POSITION

Appellees contend that the tax under the above facts as applied to appellant is not an unconstitutional burden upon interstate commerce for the following reasons—

1. It is a privilege tax levied upon the receipt of gross income in Indiana, the domicilliary state of appellant, which has been held to be a taxable event and is designed simply to reach appellant's fair share of government expense.

2. It is a general tax levied upon all residents of the State who receive gross income within the State and is in lieu *to the extent of the tax* of the general property levy.

3. That the tax is not upon interstate commerce as such, nor as such upon the receipts derived from inter-

state commerce; that the act taxed is local in character and the principle upon which it rests does not upon the same basis authorize the subjection of the commerce to cumulative burdens.

The receipt of income by a resident of the taxing sovereignty is a taxable event.

> Maguire v. Trefry, 253 U. S. 12;
> Lawrence v. State Board of Tax Commissioners, 286 U. S. 276;
> State of New York, ex rel. Cohn v. Graves, 300 U. S. 308.

As has already been pointed out, the receipt of income by a resident of a taxing sovereignty is a taxable event, quoting from the case of State of New York, ex rel. Cohn v. Graves, 300 U. S. 308 at page 312—

> "That the receipt of income by a resident of the territory of a taxing sovereignty is a taxable event is universally recognized. Domicile itself affords a basis for such taxation. Enjoyment of the privileges of residence in the state and the attendent right to invoke the protection of its laws are inseparable from responsibility for sharing the costs of government."

Persons and corporations engaged in interstate commerce are not immune from this responsibility.

> "It was not the purpose of the commerce clause to relieve those engaged in interstate commerce from their just share of state tax burdens even though it increases the cost of doing business."

> **Western Live Stock, etc., v. Bureau of Revenue, et al., etc., United States Supreme Court, No. 322, October Term, 1937, Decided February 28, 1938.**

"Even interstate business must pay its way."

Postal Telegraph Cable Company v. Richmond, 249 U. S. 252 at p. 259.

The problem as to when a state tax is a burden upon interstate commerce and when it is only the imposition of the fair share of the taxpayer's just burden of state government is a practical one and must be determined upon a practical consideration of the way the tax operates.

"Experience has taught that the opposing demands that the commerce shall bear its share of local taxation, and that it shall not, on the other hand, be subjected to multiple tax burdens merely because it is interstate commerce, are not capable of reconciliation by resort to the syllogism. Practical rather than logical distinctions must be sought."

Western Live Stock, etc., v. Bureau of Revenue, et al., etc., *supra.*

Thus the entire scheme of Indiana's tax system must be taken into consideration to determine whether in fact the tax under discussion is an illegal burden on interstate commerce. Before going into this subject in detail, however, it is desirable to consider some specific cases in which the tax has been considered not to be an illegal burden.

I.

Persons and corporations engaged in interstate commerce are subject to a property tax on the instruments employed in the commerce.

Cleveland, etc., Ry. Co. v. Backus, 154 U. S. 439;
Pullman's Palace Car Co. v. Pennsylvania, 141 U. S. 18;
Adams Express Co. v. Ohio, 165 U. S. 194.

This is so well settled as not to merit further discussion, although it is at once apparent that even such taxes add to the expense of carrying on the interstate commerce and to that extent burden it. It is sustained upon the premise that "even interstate business must pay its way" and that the tax thus imposed subjects those engaged in interstate commerce to only the usual and ordinary governmental burdens as apply equally to those engaged in intrastate business. It would seem, in passing, that any scheme of taxation whereby this same result would be reached would likewise be valid. It is not the form but the substance which speaks in such a case as this.

II.

A State may not burden interstate commerce by taxing such commerce, but it may measure the value of property of a corporation engaged in interstate commerce within the State by gross receipts, and impose a tax thereon if the same is in lieu of all taxes upon the property.

> U. S. Express Co. v. Minnesota, 223 U. S. 335;
> Cudahy Packing Co. v. Minnesota, 246 U. S. 450 at p. 453;
> Maine v. Grand Trunk Railway Co., 142 U. S. 217.

The theory upon which the court proceeded in the above cases was undoubtedly a further development of the proposition well established by the authorities that the ordinary taxation of the *property* of a person or corporation used by such person or corporation in interstate commerce is not an unlawful burden on interstate commerce. The theory accepted doctrinely the right to use gross receipts from interstate commerce as a measure provided such tax was in lieu of *all* property taxes. An examination of the laws under consideration reveals the

fact that in some of the cases the tax measured by gross receipts was not entirely in lieu of all property taxes, but that was the doctrine upon which the decisions rested. The point is well illustrated by the language of the court in the case of Cudahy Packing Co. v. Minnesota, *supra,* where the court said on page 454—

> "The question of the nature and effect of taxes more or less like this has been repeatedly considered in this court. In some instances its solution has been attended with considerable difficulty, for while the controlling general principles have long been well settled it has not been easy to apply them to all the varying situations presented. A short reference to two recent cases in which the earlier decisions were reviewed will leave little to be said in solving the question here. We refer to *Meyer* v. *Wells Fargo & Co.,* 223 U. S. 298, and *United States Express Co.* v. *Minnesota,* 223 U. S. 335, both decided on the same day. The former involved a tax in Oklahoma of a stated per cent of the gross receipts of an express company doing both a local and an interstate business in that State. The statute called the tax a 'gross revenue tax' and declared that it was to be 'in addition to the taxes levied and collected upon an *ad valorem* basis upon the property and assets' of the company. We held that the tax could not be sustained as a tax on the gross earnings, they being partly derived from interstate commerce, and also held that it could not be regarded as a property tax, because, as the statute disclosed, all the property of the company in the State was to be reached and valued in another way. The other case involved a tax in Minnesota of a designated per cent of the gross earnings of an express company from business done in that State, the business being partly local and

partly interstate commerce. The statute declared that the tax was to be in lieu of other taxes on the company's property, and the state court held that it was not in reality a tax on the gross earnings, but was a tax on the property, the earnings being taken merely as a measure of the value of the property for taxing purposes. We accepted and gave effect to that holding, not as being conclusive on us, but on the grounds that the property from which the earnings were derived was not to be otherwise taxed, that the tax was part of a system intended to reach the full value of the company's property in the State as reflected by the gross earnings, and that the amount of the tax did not appear to be in excess of what would be legitimate as an ordinary tax on the property, valued with reference to its use as part of a going concern. The case dealing with the Oklahoma tax was distinguished by pointing out that the tax could not be regarded as a property tax, because it was to be in addition to another tax reaching the full value of the company's property in the State."

As applied to a case such as was then under consideration, the *in lieu of all property taxes doctrine* is doubtless correct, since it applied only to a specially selected class and to the extent that it was in lieu of less than *all* property taxes, it was in *addition* to the ordinary general property tax. This is illustrated by the graph on page 92 of appellees' brief termed "The Crew Levick Case," considered in connection with the second graph entitled "Gross Receipts in Lieu of Property Tax Cases." The burden of the excise tax which is not in lieu of *all* property taxes of the particular taxpayer, is because it applies to a special group only. Where, as in this case, the excise tax is general to the same degree at least as the property tax, the fact that it is in lieu of less than *all*

of the property tax of a given taxpayer does not make it a burden. This is illustrated by the graph on page 92 of appellees' brief termed "The Adams Case."

III.

Local taxes measured by gross receipts from interstate commerce are not necessarily invalid by reason of that fact. It is only such taxes as have placed on the commerce burdens which are capable in point of substance of being imposed or added to with equal right by every state which the commerce touches, merely because interstate commerce is being done, it is only such taxes as those that are invalid.

Western Live Stock, etc., v. Bureau of Revenue, et al., etc., *supra*.

The tax imposed by the Indiana Act is not such a burden as, with equal right, every state which the commerce touches may impose merely because interstate commerce is being done. As in the case of Western Live Stock, etc., v. Bureau of Revenue, et al., etc., *supra*, all of the events upon which the tax is conditioned occur in Indiana. It cannot with equal right be duplicated in any other state. In this regard, it is wholly different from attempts at the taxation of gross receipts of railroad companies engaged in interstate transportation. In such cases, there is the possibility of cumulative taxation in every state which the commerce touches. For example, a railroad company whose gross receipts are derived from interstate transportation, if taxed on those gross receipts in one state, may with equal reason, be taxed thereon in every state through which it passes. The effect of this would be to subject the commerce thus represented to multiple taxes, and it would make no difference if, as to the tax imposed in any given state, the burden was no greater than was imposed on intrastate commerce within

that state, the taxation in the other states would create a discrimination and therefore a burden. It was therefore proper and right that Indiana should exclude receipts from that type of interstate commerce from consideration in fixing the tax liability.

See Regulation 140, R., p. 121.

Incidentally, this regulation disposes of most of the authorities cited by appellants as authorities.

IV.

The tax here involved is not of a type which this court in a line of decisions unbroken for more than half a century has held to be an unconstitutional burden on interstate commerce.

Appellant states the reverse of this proposition on page 10 of his brief and seeks to support it with fourteen citations of authorities. But all of the authorities cited, except two, are cases in which the levy was against gross receipts of transportation and communication companies which Indiana does not in fact tax. Of the remaining two, one was the case of a net income tax, which was upheld by the court, and the other, *Crew Levick Company* v. *Pennsylvania*, 245 U. S. 292, was a case wherein a special class only was subjected to the tax and the same was in addition to property taxes resulting, therefore, in a manifest discrimination.

The principle for which we are here contending was recognized by the court in its most recent decision on the subject—*Western Live Stock, etc.*, v. *Bureau of Revenue, et al., etc., supra.*

V.

The tax is one of general application which is neither aimed at nor discriminates against interstate commerce.

The commerce clause does not exempt appellant from such a tax.

A determined effort is made by appellant to show that the tax involved in this case is not of general application, but, we think, without avail. It is, of course, not universal, but we know of no tax which is universal in its application. The Indiana tax, however, is general in its application as that term is ordinarily used. It reaches, primarily, all persons, firms and corporations domiciled within the State of Indiana or who receive gross income from sources within the State. We find appellant objecting to the $1,000.00 exemption as contained in the act. But appellant, as well as all others, are beneficiaries of that exemption. He objects to the exemption of non-profit associations. It is not unusual to find similar exemptions in all general tax statutes. In fact, generally speaking, the same class is exempted from the Federal Net Income Tax. U. S. C. A. Tit. 26, Section 103. Apparently they would not find any objection to the generality of a net income tax with such exemptions or that the generality of such a tax is any the less general in the legal sense because the exemptions are made. He objects because in the case of banks and trust companies and similar institutions gross earnings are used as the measure. In such a case, manifestly any other method would be grossly unfair. The deposit receipt of a bank is in no sense comparable with the gross receipts of a manufacturing establishment, but gross earnings of such an institution are comparable. He objects because insurance companies which already pay the State a tax of more than one per cent on premiums are exempted. Why not? They already pay a gross receipts tax in excess of the present levy on appellant. We insist that the tax here in question clearly meets all the reasonable requirements of a tax of general application. It follows that it is neither aimed at interstate commerce nor does it discriminate against it.

With that in mind, we desire to call the court's attention to the language of Mr. Justice Stone, concurred in by Mr. Justice Holmes and Mr. Justice Brandeis, in his concurring opinion in Helson and Randolph, Co-partners, v. Kentucky, 279 U. S. 245, at page 253—

> "Nor can I find any practical justification for this distinction or for an interpretation of the commerce clause which would relieve those engaged in interstate commerce from their fair share of the expense of government of the states in which they operate by exempting them from the payment of a tax of general application, which is neither aimed at nor discriminates against interstate commerce. It 'affects commerce among the States and impedes the transit of persons and property from one State to another just in the same way, and in no other, that taxation of any kind necessarily increases the expenses attendant upon the use or possession of the thing taxed.' *Delaware Railroad Tax,* 18 Wall. 206, 232."

CONCLUSION

The Act in question was designed and intended to spread the tax base in Indiana to the end that the burden on tangible property might be reduced. This purpose has been accomplished. As a result of this tax the burden on property in Indiana has been reduced from an average of one hundred forty million per year for the four years preceding 1933 to an average of ninety-five million per year for the four years since 1933. About twenty million per year in revenue is now produced from the tax on the privilege of receiving gross income. To that extent this tax is in lieu of a general property tax.

It is general ~~in its~~ application, as general in its scope as the general property tax. It is neither aimed at nor discriminates against interstate commerce.

"It affects commerce among the states and impedes the transit of persons and property from one state to another just in the same way, and in no other, that taxation of any kind necessarily increases" the cost of doing business.

Its validity should therefore be sustained.

Respectfully submitted,

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Attorney General of Indiana.

A. J. STEVENSON,
First Assistant Attorney General.

JOSEPH W. HUTCHINSON,
Deputy Attorney General.

JOSEPH P. McNAMARA,
Deputy Attorney General.
Counsel for Appellees.

Supreme Court of the United States

October Term, 1937

No. 641

J. D. ADAMS MANUFACTURING COMPANY,
Appellant,

vs.

WILLIAM STOREN, as Chief Administrative Officer of The Department of Treasury of the State of Indiana, et al.,
Appellees.

APPEAL FROM THE SUPREME COURT OF THE STATE OF INDIANA

SUMMARY OF APPELLANT'S ARGUMENT

FREDERICK E. MATSON,
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Counsel for Appellant.

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CENTRAL PUBLISHING COMPANY, INDIANAPOLIS, INDIANA

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Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF INDIANA

SUMMARY OF POINTS ARGUED

After the arguments were completed, counsel for appellees, without advising us, left with the Clerk copies of their Summary of Argument. Later, upon the Clerk's locating us, we gave our consent to the filing of same. We first obtained copy of the Summary and the opportunity of reading it after our return to Indianapolis.

In view of the filing of appellees' Summary, we now respectfully petition the Court for leave to file the following summary of our own oral argument:

I

The Tax Is Not in Lieu of Property Taxes

Record, pp. 2, 25; Appellant's Brief, pp. 30-32

a. The so-called tax limitation law quoted in appellees' brief, p. 91, did not originate at the same legislative session as the gross income tax act, as implied by appellees' brief (pp. 39-40) and the state court (Record, p. 48). The law originated at the 1932 Special Session of the Legislature (Indiana Acts 1932, Ch. 10, p. 17). Minor amendments were made in Ch. 97, Indiana Acts 1933, p. 673. This amending act, because of defects in procedure of passage, was deemed legally insecure. The Act of 1932 was then rewritten, incorporating the amendments of Ch. 97, Acts 1933, and passed in the form of an original act as Ch. 237, Acts 1933, p. 1085. (See repealing clause, p. 1090.)

Thus, in no true sense, were the two laws "enacted concurrently." The tax limitation law was passed at a session prior to that when the gross income tax law was passed, by a Legislature and under a state administration of different political complexion, and before the gross income tax law was even thought of. They are not companion statutes, and are not to be construed together.

Chapter 10, Acts 1932, did not put a fixed limitation on tax rates, nor does the act as amended in Ch. 237, Acts 1933. Both acts provide that when "an emergency exists" for a total levy in excess of the nominal limitation, it can be approved by the new "Tax Adjustment Board," and by the state tax commissioners. This has been construed to apply to any sort of necessity for additional funds. Except in extremely rare instances, there has been no reduction of tax rate. The rate of $1.50 on each $100 of property valuation has never been in effect in Marion

County, where appellant is domiciled. (See Appendix D, Supplement to Appellant's Brief, line 2.) There has been no material reduction in property taxes in any of the industrial counties. Although gross income taxes in large amounts have been collected in such counties, only a small portion thereof has been returned to them, but instead the fund has been distributed for school purposes to the smaller counties. In the smaller counties much larger sums have been received out of the general gross income tax fund than such counties have contributed. (Appendix C, Supplement to Appellant's Brief.)

We make no criticism of this as a policy of the state; but the fact is plain that in the larger counties, including Marion, where appellant is located, total taxes have been greatly increased. In appellant's case, the accrued gross income tax from interstate commerce alone for the years 1935, 1936 and 1937 is greater than appellant's property taxes in the same years, although the property taxes are greater than in preceding years (Appendix D, Supplement to Appellant's Brief).

b. The gross income tax has no relation to property tax. The Act contains no words or implication to that effect, nor does any other statute of Indiana contain such implication. Not one of the more recent laws imposing excise taxes has affected taxes laid on real and personal property for state and local purposes, or the actual rate of such taxes, or the method of property valuation for tax assessment as provided in the General Tax Law of 1919 (Indiana Acts 1919, Ch. 59; Ind. Stat. Ann. (Burns), Sec. 64-101, *et seq.*). Even the intangibles tax law (Ch. 81, Indiana Acts 1933) was intended to and does produce more taxes on intangible property than did the General Tax Law of 1919.

c. Under the method of property valuation in Indiana, all business done in interstate commerce "pays its way" through property taxes. In addition to sections of General Tax Law of 1919 quoted on page 2, Supplement to Appellant's Brief, the following also relates to the assessment for taxation of property of all Indiana corporations as going concerns:

> "All corporate property, including capital stock and franchises, except where some other provision is made by law, shall be assessed to the corporation as to a natural person, in the name of the corporation * * *" (Acts 1919, Ch. 59, Sec. 11, p. 198; Ind. Stat. Ann. (Burns), Sec. 64-405.)

Under these sections the "true cash value" for taxation purposes, in the case of a going corporation, is arrived at by taking into consideration its issued capital stock, its franchise, the earning capacity of its property and all other facts and circumstances, including balance sheets and operating statements. Over 90 per cent of appellant's business consists of sales in interstate and foreign commerce. Hence, 90 per cent of the *going* value of appellant is due to interstate commerce and could not exist without interstate commerce. Thus, the taxable value of its real estate, building improvements, equipment, inventories, etc., is greatly enhanced by its interstate business. As appellant ccould not survive on its Indiana business alone, it is obvious that the major portion of its property taxes is due to its interstate business, and that such business "pays its way" without imposition of a gross receipts tax thereon.

II

The Thing Taxed is Inseparable From Interstate Commerce

Appellant's Brief, pp. 9-10, 17-19, 27

Appellees say the tax is on the privilege of receiving gross income, measured by the amount of gross income. Thus, the subject and the measure of the tax are coincident; and the tax is in truth upon gross receipts. It is plainly said to be "levied upon the entire gross income" in Sec. 2 and Sec. 3 (a), (b), (c) and (d) of the Act (Appellant's Brief, pp. 56-57), and in administrative regulations, Article 2 and Reg. 16. (R. 77-78.)

Gross receipts are of the very essence of commerce. They are the proceeds from, and payment for, the goods sold and shipped in interstate commerce. The thing taxed and the commerce are inseparable; they are a part of each other. And the tax is, "by its necessary effect, a tax upon such commerce." This Court so held in the *Crew Levick Case*, 245 U. S. 292, where the statute called the tax "a mercantile license tax," and the state court had construed it to be "upon the business of vending merchandise."

In the *Puget Sound Stevedoring Case* (82 L. ed. advance paging 64, decided November 8, 1937), the thing taxed was gross income received for the service of handling goods in interstate commerce. The necessity for this handling arose from sale of the goods in interstate commerce. If the state had undertaken to tax gross receipts from the goods themselves, certainly the tax would have been no less invalid.

III

The Tax May Become a Multiple Burden

The vice of the Indiana gross income tax, as applied to interstate commerce, is of the nature described by this Court in *Western Live Stock v. Bureau of Revenue*, 82 L. ed. advance paging 548, 551:

> "The vice characteristic of those which have been held invalid is that they have placed on the commerce burdens of such a nature as to be capable, in point of substance, of being imposed (*Fargo v. Michigan*, 121 U. S. 230; *Philadelphia & S. Mail S. S. Co. v. Pennsylvania*, 122 U. S. 326; *Galveston, H. & S. A. R. Co. v. Texas*, 210 U. S. 217; *Meyer v. Wells, F. & Co.*, 223 U. S. 298) or added to (*Crew Levick Co. v. Pennsylvania*, 245 U. S. 292; *Fisher's Blend Station v. Tax Commission*, 297 U. S. 650) with equal right by every state which the commerce touches, merely because interstate commerce is being done, so that without the protection of the commerce clause it would bear cumulative burdens not imposed on local commerce."

In the above case, this Court mentioned an analogous situation in the field of radio. The *Fisher's Blend Station Case* (297 U. S. 650) strikes down a tax upon broadcasting; *Station WBT, Inc. v. Poulnot* (46 F. (2d) 671), cited by this Court, strikes down a radio tax at destination. The Court said in the *Western Live Stock Case:*

> "If broadcasting could be taxed, so also could reception."

In the instant case, the same potential vice exists—if the Indiana gross income tax were held valid, it might become part of a "cumulative tax burden." The state or states of destination and intervening states in one or many ways, might attempt subsequent and cumulative taxes.

Take the illustration used in argument, of commerce in its simplest form: appellant, in Indiana, trades a road grader to a fruit grower, in California, in exchange for a carload of oranges. Here the activity of both buyer and seller is the same as if the products were sold for cash. In Indiana the buyer as well as the seller is subject to the gross receipts tax where he pays in merchandise instead of cash, the regulation treating both parties as sellers (Reg. 27; Record, p. 97). Other states may, of course, deal with the transaction in the same way, whether the sale be for cash or for merchandise.

In the above illustration, the act of the California fruit grower in receiving the road grader is of a nature identical with the act of appellant in receiving the oranges. The acts of buyer and seller are likewise identical in the common instance of an exchange of used road graders for a new road grader. It follows, therefore, that if the tax on appellant's gross receipts from a sale of its products in interstate commerce be valid, then burdens in form or substance the same may be laid on the transaction in every state the commerce touches; for example:

1. In a state having a gross receipts tax like Indiana, if appellant's sales agents should collect the price of road graders from the customers, depositing such collections to the Company's account in a local bank before remittance, the proceeds from the sales would be taxed both in the state of destination and in the state of origin.

2. A purchase tax, or tax on the privilege of buying, measured by the amount paid by the buyer, may be imposed by the state of destination. This corresponds exactly to a gross receipts tax imposed by the state of origin.

3. The sales agent of appellant in the state of destination may be required to pay an annual license tax, measured by the total amount of sales during the year or otherwise, as the state may determine; as attempted in *Brennan v. Titusville,* 153 U. S. 289, and *Stockard v. Morgan,* 185 U. S. 27.

4. The state of destination may impose a sales tax to be paid by the buyer, to be collected and turned over to the state by appellant's local sales agent, the tax to be measured by the amount of sales; as attempted in *National Cash Register Co. v. Taylor, Comptroller,* 11 N. E. (2d) 881; certiorari denied by this Court, March 28, 1938 (No. 809, *McGoldirck v. National Cash Register Co.*)

5. As appellant's products are protected during transit through intervening states by the laws of such states, any state through which the products pass may impose a tax for the privilege of transit, measured by the value or price of the goods or otherwise. Also, when the goods sold out of Indiana are paid for in other goods, the goods shipped in payment can be made subject to a like tax by the intervening states; thus creating a double transit burden on each transaction.

6. Where the products are sold in foreign commerce, each foreign state may, of course, lay thereon an import duty or tariff, as well as any other type of burden, that it sees fit.

Thus, as in the *Crew Levick Case* (245 U. S. 292) and the *Fisher's Blend Station Case* (297 U. S. 650), the commerce may be made subject to various types of burdens in the state of destination and intervening states, as well as in the state of origin, if the Indiana gross income tax may

lawfully be applied to gross receipts from commerce among the states and with foreign nations.

The tax here cannot be deemed valid for any of the reasons claimed by appellees, because it is *not*—a local property tax, as in *Cudahy Packing Co. v. Minnesota*, 246 U. S. 450; or a local franchise tax, as in *Maine v. Grand Trunk Ry.*, 142 U. S. 217; or a local occupation tax, as in *Utah Power & Light Co. v. Pfost*, 286 U. S. 165, and *American Manufacturing Co. v. St. Louis*, 250 U. S. 459; or a net income tax, as in *United States Glue Co. v. Oak Creek*, 247 U. S. 321; and, therefore, is not within the type of taxes on gross receipts which have been held valid.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES.

No. 641.—OCTOBER TERM, 1937.

J. D. Adams Manufacturing Company, Appellant, *vs.* William Storen, as Chief Administrative Officer of the Department of Treasury of the State of Indiana, et al.	Appeal from the Supreme Court of the State of Indiana.

[May 16, 1938.]

Mr. Justice ROBERTS delivered the opinion of the Court.

In this case we are called upon to determine whether the Indiana Gross Income Tax Act of 1933[1] as construed and applied burdens interstate commerce and impairs the obligation of contract in contravention of Article I, Sections 8 and 10 of the Constitution of the United States.

Section 1 declares that the phrase "gross income" as used in the Act means, *inter alia,* gross receipts derived from trades, businesses, or commerce, and receipts from investment of capital, including interest. Section 2 imposes a tax ascertained by the application of specified rates to the gross income of every resident of the State and the gross income of every non-resident derived from sources within the State. Section 6 exempts "So much of such gross income as is derived from business conducted in commerce between this state and other states of the United States, or between this state and foreign countries, to the extent to which the State of Indiana is prohibited from taxing under the Constitution of the United States of America."

The appellant, an Indiana corporation, manufactures road machinery and equipment and maintains its home office, principal place of business, and factory in the State. It sells eighty per cent. of its products to customers in other states and foreign countries upon orders taken subject to approval at the home office. Shipments are made from the factory and payments are remitted

1 Indiana Acts 1933, c. 50; Ind. Stat. Ann. (Burns) Sec. 64-2601 ff.

to the home office. Pursuant to a practice of investing surplus funds not immediately required in its business, the appellant owns and receives interest upon bonds and notes of Indiana municipal corporations which, at the time they were issued, were declared by statute to be exempt from taxation.

Upon the adoption of the Act, the appellant filed a petition in a State circuit court in which, after reciting these facts, it alleged that the appellees were demanding that it report and pay taxes upon income received in interstate and foreign commerce and income received as interest upon securities exempted from taxation by the State law and that these demands, together with penalties specified in the statute for failure to make return and pay the tax, would be enforced unless prevented by the judgment of the court. The prayer was for a declaratory judgment that the Act, as construed and applied by the appellees, is unconstitutional. After issue joined the facts were stipulated and the court made findings and entered a judgment in favor of the appellant. The Supreme Court of Indiana reversed the judgment holding that the tax demanded does not unconstitutionally burden the interstate commerce in which appellant is engaged and does not impair the obligation of any contract of the State exempting municipal securities from taxation.[2]

1. Will the threatened imposition of the tax on the gross income from the appellant's sales in interstate commerce contravene Article I, Section 8 of the Constitution, which reposes in Congress power to regulate interstate and foreign commerce?

The title of the Act declares that it is a revenue measure imposing a tax upon "the receipt of gross income." The statute defines gross income as meaning the gross receipts derived from trades, businesses, or commerce. The Supreme Court of Indiana in its opinion states: "The statute here under consideration levies a tax upon all who are domiciled within the state, based upon the privilege of domicile, and transacting business, and receiving gross income, within the state, and measured by the amount of gross income."[3]

The tax is not an excise for the privilege of domicile alone, since it is levied upon the gross income of non-residents from sources

[2] — Ind. —; 7 N. E. (2d) 941.

[3] Compare Miles *v.* Department of Treasury, 209 Ind. 172, 188; 199 N. E. 372, 379.

within the State. Nor is it for the transaction of business since in many instances it hits the receipt of income by one who conducts no business. It is not a charter fee or a franchise fee measured by the value of goods manufactured or the amount of sales such as the State would be competent to demand from domestic or foreign corporations for the privilege conferred.[4] It is not an excise upon the privilege of producing or manufacturing within the State, measured by volume of production or the amount of sales.[5] It is not a tax in lieu of ad valorem taxes upon property, which would be inoffensive to the commerce clause,[6] since the appellant pays local and state taxes upon its property within the State and it appears that these, as respects appellant and others similarly situated, have not been reduced. The Act, moreover, is silent as to the tax being in lieu of property taxes. The opinion of the Supreme Court suggests that the statute was adopted as part of a scheme for the reduction of local property taxes and the substitution of a gross income tax but, as appellant points out, provision for reduction of property taxes was made by legislation passed in 1932.[7]

The regulations issued by the Department of the Treasury, pursuant to authority granted by the Act, treat the exaction as a gross receipts tax;[8] and the Attorney General says in his brief that it is a privilege tax upon the receipt of gross income. We think this a correct description.

We conclude that the tax is what it purports to be,—a tax upon gross receipts from commerce. Appellant's sales to customers in other states and abroad are interstate and foreign commerce. The Act, as construed, imposes a tax of one per cent. on every dollar received from these sales.

The vice of the statute as applied to receipts from interstate sales is that the tax includes in its measure, without appor-

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4 Compare Matson Navigation Co. *v.* State Board, 297 U. S. 441, 444.

5 Compare American Manufacturing Co. *v.* St. Louis, 250 U. S. 459; Oliver Iron Co. *v.* Lord, 262 U. S. 172; Hope Gas Co. *v.* Hall, 274 U. S. 284; Utah Power & Light Co. *v.* Pfost, 286 U. S. 165.

6 Compare Postal Telegraph Cable Co. *v.* Adams, 155 U. S. 688; United States Express Co. *v.* Minnesota, 223 U. S. 335; Pullman Co. *v.* Richardson, 261 U. S. 330.

7 Indiana Acts of 1932, Chap. 10, p. 17.

8 Article 2 of the Regulations states "The gross income tax of 1933 is primarily and in effect a gross receipts tax . . ." Article 16 states that the "tax shall apply to and be levied and collected upon all gross income received . . .".

tionment, receipts derived from activities in interstate commerce; and that the exaction is of such a character that if lawful it may in substance be laid to the fullest extent by states in which the goods are sold as well as those in which they are manufactured. Interstate commerce would thus be subjected to the risk of a double tax burden to which intrastate commerce is not exposed, and which the commerce clause forbids.[9] We have repeatedly held that such a tax is a regulation of, and a burden upon, interstate commerce prohibited by Article I, Section 8 of the Constitution.[10] The opinion of the State Supreme Court stresses the generality and nondiscriminatory character of the exaction but it is settled that this will not save the tax if it directly burdens interstate commerce.[11]

The State court and the appellees rely strongly upon *American Manufacturing Company* v. *St. Louis,* 250 U. S. 459, as supporting the tax on appellant's total gross receipts derived from commerce with citizens of the State and those of other states or foreign countries. But that case dealt with a municipal license fee for pursuing the occupation of a manufacturer in St. Louis. The exaction was not an excise laid upon the taxpayer's sales or upon the income derived from sales. The tax on the privilege for the ensuing year was measured by a percentage of the past year's sales.[12] The taxpayer had during the preceding year removed some of the goods manufactured to a warehouse in another state and, upon sale, delivered them from the warehouse. It contended that the city was without power to include these sales in the measure of the tax for the coming year. The court held, however, that the tax was upon the privilege of manufacturing within the state and it was permissible to measure the tax by the sales

[9] See Western Livestock *v.* Bingaman, No. 322, October Term, 1937.

[10] Cook *v.* Pennsylvania, 97 U. S. 566; Fargo *v.* Michigan, 121 U. S. 230; Philadelphia and Southern S. S. Co. *v.* Pennsylvania, 122 U. S. 326; Galveston, etc. Ry. Co. *v.* Texas, 210 U. S. 217; Meyer *v.* Wells Fargo & Co., 223 U. S. 298; The Minnesota Rate Cases, 230 U. S. 352, 400; Crew Levick Co. *v.* Pennsylvania, 245 U. S. 292; United States Glue Co. *v.* Oak Creek, 247 U. S. 321, 328; New Jersey Telephone Co. *v.* Tax Board, 280 U. S. 338, 349; Fisher's Blend Station *v.* State Tax Commission, 297 U. S. 650, 655; Puget Sound Stevedoring Co. *v.* Tax Commission, 302 U. S. 90; ~~Western~~ Livestock *v.* Bingaman, No. 322, October Term, 1937.

[11] Crew Levick Co. *v.* Pennsylvania, 245 U. S. 292; Spalding & Bros. *v.* Edwards, 262 U. S. 66, 69; Cooney *v.* Mountain States Tel. Co., 294 U. S. 384, 393.

[12] Compare Bass, Ratcliff & Gretton *v.* State Tax Comm., 266 U. S. 271, 280; Educational Films Corp. *v.* Ward, 282 U. S. 379, 387-8.

price of the goods produced rather than by their value at the date of manufacture. If the tax there under consideration had been a sales tax the city could not have measured it by sales consummated in another state. That the tax in the present case is not a tax on the manufacture but a tax on gross sales, is evident from the regulations promulgated pursuant to the Act and confirmed by an amendment of the statute adopted in 1937 under which, if the appellant had shipped its products to another state and thence sold them (as did the American Manufacturing Company), the receipts from the sales woul be exempt from the gross income reached by the Act.[13]

So far as the sale price of the goods sold in interstate commerce includes compensation for a purely intrastate activity, the manufacture of the goods sold, it may be reached for local taxation by a tax on the privilege of manufacturing, measured by the value of the goods manufactured,[14] or by other permissible forms of levy upon the intrastate transaction.[15] It is because the tax, forbidden as to interstate commerce, reaches indiscriminately and without apportionment, the gross compensation for both interstate commerce and intrastate activities that it must fail in its entirety so far as applied to receipts from sales interstate.

We hold that, as respects the appellant's sales of its manufactured product in interstate and foreign commerce, the statute cannot constitutionally be enforced.

2. Will the imposition of the tax in respect of interest on the bonds of Indiana municipalities violate Article I, Section 10 of the Constitution of the United States?

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13 Regulations 193 (4) "Persons resident and/or domiciled in Indiana who are engaged in business, the legal situs and location of which is in states other than Indiana, and the activities of such business are carried on in states other than Indiana, will not be required to pay tax upon the gross receipts therefrom."

Acts of Indiana, 1937, Chapter 117, p. 609: "That with respect to individuals resident in Indiana and corporations incorporated under the laws of Indiana authorized to do and doing business in any other state and/or foreign country, the term 'gross income' shall not include gross receipts received from sources outside the State of Indiana in cases where such gross receipts are received from a trade or business situated and regularly carried on at a legal situs outside the State of Indiana, or from activities incident thereto . . ."

14 Oliver Iron Mining Co. *v.* Lord, 262 U. S. 172; Hope Natural Gas Co. *v.* Hall, 274 U. S. 284; American Mfg. Co. *v.* St. Louis, *supra.*

15 Utah Power & Light Co. *v.* Pfost, 286 U. S. 165; Federal Compress Co. *v.* McLean, 291 U. S. 17; Chassaniol *v.* Greenwood, 291 U. S. 584.

By an Act of March 9, 1903, entitled "An Act to exempt from taxation all bonds, notes and other evidences of interest-bearing debt issued by the State or by municipal corporations", it was provided "That all bonds, notes and other evidences of indebtedness hereafter issued by the State of Indiana or by municipal corporations within the State upon which the said State or the said municipal corporations pay interest shall be exempt from taxation."[16] By an Act of March 11, 1919, tax laws of the State were codified and the Act of 1903 was incorporated without change as clause twentieth of Section 5 of the codification.[17] The section has since been amended but the twentieth clause remained unchanged at the date of the passage of the Gross Income Tax Act of 1933.

The appellant insists that the exemption granted in the Acts of 1903 and 1919, constitutes a contract with purchasers of municipal securities the obligation of which is unconstitutionally impaired by the attempt to tax the interest they yield. The State replies that the Acts were not intended to create a contract and did not in fact do so, but that if they did, the covenant did not embrace interest payable on municipal obligations but only ad valorem taxation upon them.

When the exemption laws were adopted the State had no income tax law. Whatever may have been the background against which the Act of 1903 is to be construed, its setting, as a portion of the tax codification of 1919, is significant. The latter deals with two forms of taxation,—poll taxes and property taxes. It embodies a comprehensive scheme of annual assessment of real and personal property of individuals, partnerships, and corporations, including public utilities; makes provision for a return by taxpayers of complete inventories of property and, in the case of corporations, of the excess value of capital stock and surplus and of the value of franchises or privileges enjoyed; and provides for assessment by public officials for the purpose of the application of a rate ad valorem by various public bodies. The statute has nothing to say with respect to license, occupation, privilege or other excise taxes. In Section 25 it provides that "Where bonds or stocks are now or may hereafter be exempted from taxation, the accrued interest on such bonds or dividends on such stock shall be listed and

16 Acts of Indiana, 1903, c. CLXXIX, p. 322.

17 Acts of Indiana, 1919, c. 59, Section 5 (twentieth) p. 203.

assessed, unless otherwise exempted, without regard to the time when the same is to be paid." Thus the legislature distinguished between the bonds themselves and the interest accrued upon them as separate subjects of assessment and ad valorem taxation. The Supreme Court of Indiana has consistently held that exemptions from taxation are not favored but are to be strictly construed.[18]

In the light of the foregoing facts we are of opinion that the case is controlled by *Hale* v. *Iowa State Board*, No. 16, October Term, 1937. We are unable, therefore, to hold that the decision of the Supreme Court is plainly wrong, even upon the assumption that in adopting the statutory exemption the legislature intended to, and in fact did, contract with purchasers of municipal bonds.

As respects the tax demanded on appellant's gross income from its business in interstate commerce, the judgment is reversed and, as respects the tax on interest received from obligations issued by municipalities of the State, the judgment is affirmed. The cause will be remanded for further proceedings not inconsistent with this opinion.

So ordered.

Mr. Justice McReynolds is of opinion that the challenged judgment should be reversed in toto.

Mr. Justice Cardozo took no part in the consideration or decision of this case.

A true copy.

Test:

Clerk, Supreme Court, U. S.

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18 South Bend v. University, 69 Ind. 344, 348; Read v. Yeager, 104 Ind. 195, 199.

SUPREME COURT OF THE UNITED STATES.

No. 641.—October Term, 1937.

J. D. Adams Manufacturing Company, Appellant, *vs.* William Storen, as Chief Administrative Officer of The Department of Treasury of the State of Indiana, et al., Appellees.	Appeal from the Supreme Court of the State of Indiana.

[May 16, 1938.]

Mr. Justice Black, dissenting in part.

The Indiana statute of 1933 here invalidated imposes "a tax, measured by the amount or volume of gross income, . . . upon all residents of the State of Indiana, and upon the gross income derived from sources within the State of Indiana, of all persons and . . . companies, . . . who are not residents of . . . Indiana, but are engaged in business in Indiana.". The tax is general in effect throughout the entire State, applying to all who do business and who receive annual incomes in the State above $1,000.00 (with minor exceptions). It falls uniformly upon all such gross incomes whether derived from interstate or intrastate business or from investments, interest or services.[1] There is no contention that the statute was inspired by any spirit of antagonism or hostility to interstate commerce or that it discriminates against interstate commerce in amount or method of application.

Concurrently with the passage of this Revenue Act, the Indiana legislature limited the tax that could be imposed upon other forms

1 The generality of this tax is made clear in its definition of gross income as including, with minor exceptions, "the gross receipts of the taxpayer received as compensation for personal services, and the gross receipts of the taxpayer derived from trades, businesses or commerce, and the gross receipts proceeding or accruing from the sale of property, tangible or intangible, real or personal, or service, or any or all of the foregoing, and all receipts by reason of the investment of capital, including interest, discount, rentals, royalties, fees, commissions or other emoluments, however designated, . . ." Section (f), Chapter 50, Indiana Acts 1933.

of property by the State or any "taxing units within the state."[2] The Supreme Court of Indiana in the opinion below[3] said:

"Legislative history indicates that one of the purposes of the Gross Income Tax Law was to redistribute governmental burdens and relieve property of a tax burden which was thought to be too great."

Indiana passed this gross income tax law at a time when depressed economic conditions were causing the fiscal policies of many States to turn toward similar legislation.[4] Serious financial difficulties of the States stimulated efforts to find new sources of taxation, and the widespread belief that property was bearing an unfair burden of taxes also substantially contributed to the levying of these new taxes.[5]

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2 Acts of Indiana, 1933, page 1085 (Act approved March 9, 1933). The Gross Income Tax Law was approved February 27, 1933, Acts 1933, Indiana, Chapter 50, 78th Session, page 388.

3 7 N. E. (2d) 941, 945.

4 "The obtaining of funds to replenish impoverished treasuries was the principal goal of the state legislatures in 1933. Relief to property also was a much sought after end. Property relief was accorded through reduced appropriations, lowered tax limits, and collection leniency. The drive for new revenue resulted in the adoption of gross income or gross sales taxes in fifteen states. . . .

"The development of the gross income or gross sales taxes is probably the outstanding tax news of the year." The Tax Magazine, Vol. 12, February, 1934, page 63, "State Tax Legislation, 1933," Raymond E. Manning. *Id.*, see page 365, "Chart of State Sales, Gross Income, and License Taxes."

5 "Indiana's fiscal strain was not to be found in the state government until the $1.50 property tax limitation adopted by the legislature in 1932 cut almost in half the state rate on property, which had been furnishing not far from one-fourth of total state revenues (including motor vehicle taxes). Coupled with a drastic shrinkage in assessed valuations and a demand for increased state aid to localities, this made it imperative for the state government to seek new revenue sources even though the other tax yields had been holding up fairly well through 1931-32. . . .

"It is evident that the local tax situation was the chief factor bringing about the sweeping change in the state's own system. For one not intimately acquainted with conditions in Indiana it is not easy to locate from the available data the precise sources of trouble, but whatever they may have been, the tax limitation law crystallized them, and the result is a threatened breakdown of governmental finance in many localities, unless the state succeeds in carrying out its greatly increased program of aid to localities through highway and school moneys. . . .

"The campaign in support of the [gross receipts] tax . . . was led by the Indiana Farm Bureau, which secured the signatures of a large number of farmers on a petition urging the passage of a sales tax. On February 12 a meeting of farmers and other property owners was held, and several thousand marched to the capitol. For several years the bureau had been urging the reduction of property taxes, and partly as a result of its efforts the $1.50 law was passed in the special session of 1932, limiting the state levy to 15 cents and all local levies to $1.35 per $100 of assessed value. . . .

"The Indianapolis Real Estate Board, in addition to cooperating with the Indiana Farm Bureau, worked with the Indiana Real Estate Association and

Appellant is an Indiana corporation engaged in the business of manufacturing and selling road machinery. All of the machinery is manufactured in Indiana. Its office, only plant and all its properties are located in Indiana. Its products are sold to ultimate purchasers in Indiana and other States by independent distributors or through sales agents of appellant. All sales must be approved by, and all payments made to appellant's office in Indiana. While appellant is thus engaged in interstate commerce, obviously, a major portion of its activities takes place in Indiana.

The prevailing judgment here is that Indiana cannot constitutionally impose this tax measured by the gross income received by appellant in Indiana from that substantial part of its products (manufactured in Indiana) sold to purchasers in other States. It is held that the tax, thus applied, is prohibited by Section 8, Article 1 of the Federal Constitution which provides that

"The Congress shall have power . . . to regulate commerce among the several states, ..."

The Indiana tax is not invalidated on the ground that it violates any law passed by Congress under this constitutional power to regulate interstate commerce.

This power to regulate commerce among the States "like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the Constitution."[6]

The question, therefore, is whether—in the absence of regulatory legislation by Congress condemning state taxes on gross receipts from interstate commerce—the Commerce Clause, of itself, prohibits *all* such state taxes, as "regulations" of interstate commerce, even though general, uniform and non-discriminatory.

All state taxes on gross receipts from interstate commerce do not discriminate against, or impose extraordinary burdens upon, that commerce. Those that do not, do no more than impose a

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the Federation of Community Civic Clubs. A meeting of all these organizations, held on February 10, 1933, passed resolutions favoring the sales tax" "The Sales Tax in the American States," Haig and Shoup, (1934, Columbia University Press), 238, 241, 242.

[6] Cf. Gibbons *v.* Ogden, 9 Wheat. 1, 196, 197. Since Congress has not acted upon this subject, the present case does not involve a manifestation by Congress of its paramount and exclusive authority to regulate an aspect of interstate commerce with which the states may deal (because of its local nature) until Congress acts. Cf., N. Y. C. R. R. *v.* County of Hudson, 227 U. S. 248.

normal burden of government upon that commerce. On the other hand, some state gross income taxes may be designed or applied so as seriously to impede the freedom of interstate commerce. If interstate commerce should be so impeded, Congress might—under its commerce power—find it "necessary and proper" to condemn *all* state taxes on gross receipts, in order to "carry into execution" its granted power to regulate and protect interstate commerce.[7] We are not here confronted with such a congressional enactment. Should the Indiana law, and *all* state taxes on gross receipts from interstate commerce, as such—in the absence of such enactment—be condemned as a regulation of interstate commerce in the constitutional sense?

"Taxation" and "regulation" are not synonymous; all state, county or city taxes that affect interstate commerce do not "regulate" it in the constitutional sense; unquestionably, taxes can be levied for revenue only. As pointed out by Mr. Justice Holmes in *Galveston, Harrisburg, etc., Railway Co.* v. *Texas,* 210 U. S. 217, 225, involving a state tax which was not general but was levied only on gross receipts laid on railroads:

"It being once admitted, as of course it must be, that not every law that affects commerce among the States is a regulation of it in a constitutional sense, nice distinctions are to be expected."

The majority there found that the tax on interstate transportation violated the Commerce Clause. The dissent, applying the similar principle that every gross receipts tax is not necessarily a regulation, insisted that the particular gross receipts tax involved did not "attempt to regulate commerce among the states" and should not "be taken as a tax on interstate commerce in the sense of the Constitution; for its operation on interstate commerce is only incidental, not direct." Both opinions recognized a distinction between taxes for revenue, which incidentally affect interstate commerce, and other taxes which directly regulate commerce. More recently, this Court has said in *Western Live Stock* v. *Bingaman,* 302 U. S. —:

"Recognizing that not every local law that affects commerce is a regulation of it in a constitutional sense, this Court has held that local taxes may be laid on property used in the commerce; that its value for taxation may include the augmentation attributable to the

7 Cf., Houston and Texas Railway *v.* United States (The Shreveport Case), 234 U. S. 342, 350 *et seq.*

commerce in which it is employed; and, finally, that the equivalent of that value may be computed by a measure related to gross receipts when a tax of the latter is substituted for a tax of the former."[8]

Many cases relied on to support the prevailing judgment here hold that state gross receipts taxes imposed on interstate "transportation" violate the Commerce Clause. While this construction of the Commerce Clause had been previously considered, it was fully clarified and delimited in *Phila. Steamship Co.* v. *Pennsylvania,* 122 U. S. 326, 341, 342, 344, 345, and that decision has served as the authoritative basis for subsequent decisions:

"The tax in the present case is laid upon the gross receipts for transportation *as such.* Those receipts are followed and caused to be accounted for by the company, dollar for dollar. It is those specific receipts, or the amount thereof, (which is the same thing,) for which the company is called upon to pay the tax. They are taxed, not only because they are money, or its value, but because they were received for transportation. No doubt a ship-owner, like any other citizen, may be personally taxed for the amount of his property or estate, *without regard to the source from which it was derived, whether from commerce, or banking, or any other employment.* But that is an entirely different thing from laying a special tax upon his receipts in a particular employment. . . .

"It [the tax under consideration] is not a general tax on the income of all the inhabitants of the state; but a special tax on transportation companies. Conceding, however, that an income tax may be imposed upon certain classes of the community, distinguished by the character of their occupations; this is not an income tax on the class to which it refers, but a tax on their receipts for transportation . . . It is clearly not such, but a tax on transportation only." (Italics supplied.)

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8 " . . . the bare fact that one is carrying on interstate commerce does not relieve him from many forms of state taxation which add to the cost of his business. He is subject to a property tax on the instruments employed in the commerce . . . and if the property devoted to interstate transportation is used both within and without the state a tax fairly apportioned to its use within the state will be sustained. . . . Net earnings from interstate commerce are subject to income tax . . . and if the commerce is carried on by a corporation a franchise tax may be imposed, measured by the net income from business done within the state, including such portion of the income derived from interstate commerce as may be justly attributable to business done within the state by fair method of apportionment. . . . All of these taxes in one way or another add to the expense of carrying on interstate commerce, and in that sense burden it; but they are not for that reason prohibited." Western Live Stock *v.* Bingaman, 302 U. S. —.

Previous decisions had held that the Commerce Clause did not prohibit state taxes on gross receipts from interstate commerce.[9] The effect of these prior decisions was modified by the *Philadelphia Steamship Co.* case. The latter case decided (contrary to the previous decisions) that a state tax on gross receipts received for actual interstate transportation is prohibited by the Commerce Clause. In that case the tax invalidated was a selective tax applied to the particular business of transportation. Consequently, the Court did not decide whether a state could constitutionally impose a general gross income tax (such as Indiana's) to an interstate business (such as appellant's) not involving transportation. *Crew Levick Co.* v. *Pennsylvania,* 245 U. S. 292, December, 1917, and *United States Glue Co.* v. *Oak Creek,* 247 U. S. 321, June, 1918, marked the all-inclusive condemnation of state taxes on gross receipts from interstate commerce, as a class—without regard to discrimination or generality.

However, as pointed out in the opinion, the "bare question" in the *Crew Levick* case was "whether a state tax imposed upon the business of selling goods in foreign commerce, insofar as it is measured by the gross receipts from merchandise shipped to for-

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9 " . . . it is not everything that affects commerce that amounts to a regulation of it, within the meaning of the Constitution. . . .

" . . . we think it may safely be laid down that the gross receipts of railroad or canal companies, after they have reached the treasury of the carriers, though they may have been derived in part from transportation of freight between States, have become subject to legitimate taxation. It is not denied that net earnings of such corporations are taxable by State authority without any inquiry after their sources, and it is difficult to state any well-founded distinction between the lawfulness of a tax upon them and that of a tax upon gross receipts, or between the effects they work upon commerce, except perhaps in degree." State Tax on Railway Gross Receipts, 15 Wall. 284, 293, 296.

"The tax [15 Wall. 284] on gross receipts was held not to be repugnant to the Constitution, because imposed on the railroad companies in the nature of a general income tax, and incapable of being transferred as a burden upon the property carried from one State to another. . . .

" . . . It is as important to leave the rightful powers of the State in respect to taxation unimpaired as to maintain the powers of the Federal government in their integrity.

"In the second of the cases recently decided, the whole court agreed that a tax on business carried on within the State and without discrimination between its citizens and the citizens of other States, might be constitutionally imposed and collected. . . .

"It is to be observed that Congress has never undertaken to exercise this power in any manner inconsistent with the municipal ordinance under consideration, and there are several cases in which the court has asserted the right of the State to legislate, in the absence of legislation by Congress, upon subjects over which the Constitution has clothed that body with legislative authority." Osborne *v.* Mobile, 16 Wall. 479, 481, 482.

eign countries, is in effect a regulation of foreign commerce or an impost upon exports, within the meaning of the pertinent clauses of the Federal Constitution.'' The tax there involved was not a general income tax bearing uniformly upon all business within the State. When the opinion in the *United States Glue Co.* case—where a gross income tax was not in issue—indicated approval of an extension of the previous constitutional rule so as to condemn—as a class—*all* state taxes on gross receipts from interstate commerce, the Court clearly set out its reasons for the extension. The Court said that the distinction:

'' . . . between a tax measured by gross receipts and one measured by net income, recognized by our decisions, is manifest and substantial, and it affords a convenient and workable basis of distinction between a direct and immediate burden upon the business affected and a charge that is only indirect and incidental. A tax upon gross receipts affects each transaction in proportion to its magnitude and irrespective of whether it is profitable or otherwise. Conceivably it may be sufficient to make the difference between profit and loss, or to so diminish the profit as to impede or discourage the conduct of the commerce. A tax upon the net profit has not the same deterrent effect, since it does not arise at all unless a gain is shown over and above expenses and losses, and the tax cannot be heavy unless the profits are large. Such a tax, when imposed upon net income from whatever source arising, is but a method of distributing the cost of government, like a tax upon property, or upon franchises treated as property; and if there be no discrimination against interstate commerce, either in the admeasurement of the tax or in the means adopted for enforcing it, it constitutes one of the ordinary and general burdens of government, from which persons and corporations otherwise subject to the jurisdiction of the states are not exempted by the Federal Constitution because they happen to be engaged in commerce among the states.''

A tax upon property used in interstate commerce, even with an augmented value due to such use, is not a regulation of commerce, is valid and is within the powers of the state.[10] Yet, the constitutional validity of a tax on property does not turn upon whether the property is profitable to its owner. Gross receipts from interstate commerce—as from all sources—vary and will probably rise and fall with property values. Therefore, the total amount exacted from interstate commerce under a gross receipts tax can fluctuate

[10] Cf., Cudahy Packing Company *v.* State of Minnesota, 246 U. S. 450, 453, 454; United States Express Co. *v.* Minnesota, 223 U. S. 335, 345, 347.

just as the total paid under a property tax. Since property and corporate franchises used in interstate commerce can be constitutionally taxed by States, whether profitable or unprofitable, it seems difficult to justify a constitutional test for state income taxes based upon existence or absence of profit.

The application of such a constitutional test will—as a practical matter—inevitably result in exempting *all* enterprises engaged in interstate commerce from *all* state gross income taxes on interstate commerce receipts, whether profitable or not. At the same time, local intrastate enterprises, doing business in the same communities, must pay state gross receipts taxes whether profitable or unprofitable. Such a construction of the Commerce Clause—designed to prevent a State from imposing unfair tax burdens upon those engaged in interstate commerce—actually serves to impose an unfair and discriminatory burden upon local intrastate business. Failure of an interstate business to make a profit does not relieve the State of its burden in affording protection for that business. While the Federal government is charged with the constitutional duty of protecting and fostering interstate commerce by proper regulation[11] it has not attempted to provide local governmental protection for those engaged in such commerce. However desirable it may be, as a tax policy, to tax in accordance with ability to pay, the failure to make a profit should not of itself create a *constitutional* exemption from a tax which the State might otherwise impose.[12] And, as a practical matter, state taxing authorities may be moved by the consideration that profits are not always capable of ascertainment with complete accuracy and certainty.[13]

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[11] Dayton Goose Creek Railway *v.* United States, 263 U. S. 456, 478.

[12] State Railroad Tax Cases, 92 U. S. 575, 606; cf., Ohio Tax Cases, 232 U. S. 576, 590.

[13] Cf., with reference to a state tax law assailed as violative of the Fourteenth Amendment, dissent of Mr. Justice Cardozo: "But profits themselves are not susceptible of ascertainment with certainty and precision except as the result of enquiries too minute to be practicable. The returns of the taxpayer call for an exercise of judgment as well as for a transcript of the figures on his books. They are subject to possible inaccuracies, almost without number. Salaries of superintendence, figuring as expenses, may have been swollen inordinately; appraisals of plant, of merchandise, of patents, of what not, may be erroneous or even fraudulent. In the words of a student of the problem, 'statements of profits are affected both by accounting methods and by the optimistic or pessimistic light in which the future is viewed at the time when the accounts are made up.' . . . These difficulties and dangers bear witness to the misfortune of forcing methods of taxation within a Procrustean formula.

It has been suggested, however, that Indiana might by law apportion to itself that part of a tax on gross receipts from interstate commerce to which it is entitled. Such an apportionment by Indiana would, in effect, fix the portion of such a tax for the other forty-seven States which appellant's interstate business might touch. Indiana has no authority to determine what, how, when or to what extent other States may tax within their respective boundaries. If such power of apportionment or allocation exists at all, it must be true that the only repository of a power touching complex and national aspects of interstate commerce is not Indiana, not the Judiciary—but the National Congress.

Interstate commerce constitutes a large part of the business of the nation. Until Congress, in the exercise of its plenary power over interstate commerce, fixes a different policy, it would appear desirable that the States should remain free to adopt tax systems imposing uniform and non-discriminatory taxes upon interstate and intrastate business alike.

It also urged that a gross receipts tax under the Commerce Clause is invalid because it might result in multiple burdens on interstate commerce.[14] The possibility is suggested that the States may use gross income taxes to create direct, extraordinary, and unjust burdens upon interstate commerce and that this possibility requires that *all* state taxes on gross interstate commerce receipts be condemned as within the prohibition of the Commerce Clause. Congress was undoubtedly given the exclusive power to regulate commerce in order that undue, unjust and unfair burdens might not be imposed upon such commerce.[15] It was not intended, however, that interstate commerce should enjoy a preferred status over intrastate business or to remove those engaged in interstate commerce from the ordinary and usual burdens of the government which affords such commerce protection.[16] A court may act to protect a litigant from unfair and unjust burdens upon the litigant's interstate business. Yet, it would seem that only Congress has the power to formulate rules, reg-

If the state discerns in business operations uniformities and averages that seem to point the way to a system easier to administer than one based upon a report of profits, and yet likely in the long run to work out approximate equality, it ought not to be denied the power to frame its laws accordingly." Stewart Dry Goods Co. *v.* Lewis, 294 U. S. 550, 576-577.

14 See, Western Live Stock *v.* Bingaman, 302 U. S. —.

15 Phila. Steamship Co. *v.* Pennsylvania, 122 U. S. 326, 346.

16 See, Woodruff *v.* Parham, 8 Wall. 123, 137.

ulations and laws to protect interstate commerce from *merely possible future unfair burdens.* Here the record does not indicate any charge or proof of an existing extraordinary, unfair or multiple tax burden on appellant. The tax burden from which appellant is here exempted is one which the local taxpayers of Indiana must bear. As a result, an unjust and unfair burden is actually imposed upon intrastate business, because of an apprehension of a possible future injury to interstate commerce. The control of future conduct, the prevention of future injuries and the formulation of regulatory rules in the fields of commerce and taxation, all present legislative problems.

This Court has sustained, and the majority opinion refers approvingly to a municipal license tax in Missouri, imposed in addition to an ad valorem property tax, in which the amount of the license was measured by the amount received for the interstate sale of goods manufactured within the municipality.[17] It is true that the amount of the license for a succeeding year was there measured by a percentage of the amount of sales for the preceding year, while the Indiana tax is paid quarterly during the year of sale. However, if we look to substance and effect, disregard the nominal designation of each tax, and consider the realities of the two taxes, the tax burdens are identical under the approved Missouri tax and the disapproved Indiana tax.[18] Numerous other decisions have recognized the principle of including receipts from interstate commerce in the figure (not wholly derived from such commerce) used in measuring the amount of a state excise tax.[19]

It has been often said that no formula can be devised for determining in all cases whether or not a state tax is prohibited by the Commerce Clause, and that "the question is inherently a practical one, depending for its decision on the special facts of each case, . . ."[20] A formula which arbitrarily stamps *every* state gross re-

17 American Mfg. Co. *v.* St. Louis, 250 U. S. 459.

18 Apparently, if the Indiana tax had been "on the privilege of manufacturing, measured by the total gross receipts from sales of the manufactured goods, both intrastate and interstate" instead of designated as "a tax, measured by the amount or volume of gross income" received from manufacturing and sales interstate and intrastate, the tax would be held valid. See, Western Live Stock *v.* Bingaman, 302 U. S. —.

19 Hump Hairpin Co. *v.* Emmerson, 258 U. S. 290, 294; Maine *v.* Grand Trunk Railway Co., 142 U. S. 217; Wisconsin and Michigan Railway Co. *v.* Powers, 191 U. S. 379; United States Express Co. *v.* Minnesota, 223 U. S. 335, 343.

20 Hump Hairpin Co. *v.* Emmerson, *supra*, at 295.

ceipts tax as a violation of the Commerce Clause, on the ground that it can be used for cumulative tax purposes, leaves unanswered the possibility that other taxes, previously held valid, may be used with like effects on interstate commerce; disregards the fact that in many cases, as here, such a tax can be fairly and uniformly applied to both interstate and intrastate commerce; and in effect actually denies a State the privilege of using such a tax unless willing to impose unjust and unequal burdens upon its own citizens engaged in intrastate commerce.

The receipt of income is a taxable event and need not necessarily enjoy the immunity of the income's source.[21] Appellant's receipt of gross income could be taxed in one State only, because appellant received income only in Indiana. A sales tax might possibly be imposed upon independent distributors of appellant's products who do business in other States. Such tax would be constitutional only if it did not discriminate against appellant's products.[22] Distributors in States other than Indiana do business under the protection of their respective States. Under these circumstances, nondiscriminatory sales taxes in those States upon the distributors

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21 In sustaining an income tax law of the State of New York against a challenge that it violated the Fourteenth Amendment, it was said: "That the receipt of income by a resident of the territory of a taxing sovereignty is a taxable event is universally recognized. Domicil itself affords a basis for such taxation. Enjoyment of the privileges of residence in the state and the attendant right to invoke the protection of its laws are inseparable from responsibility for sharing the costs of government. 'Taxes are what we pay for civilized society.' . . . Neither the privilege nor the burden is affected by the character of the source from which the income is derived. For that reason income is not necessarily clothed with the tax immunity enjoyed at its source. . . . It may tax net income from operations in interstate commerce although a tax on the commerce is forbidden, United States Glue Co. *v.* Oak Creek, 247 U. S. 321; Shaffer *v.* Carter, . . . [252 U. S. 37, 50]." New York ex rel. Cohn *v.* Graves, 300 U. S. 308, 312, 313. The dissent called attention to the fact that not only was the New York taxpayer subject to an income tax in that State by the decision, but that "New Jersey, in addition to tax on the land measured by its value, may lay a tax upon the income received by the owner for its use." (at page 318.)

22 " 'A state tax upon merchandise brought in from another state, or upon its sales, whether in original packages or not, after it has reached its destination and is in a state of rest is lawful only when the tax is *not* discriminating in its incidence against the merchandise because of its origin in another State.' Sonneborn Bros. *v.* Cureton, [262 U. S. 506] at 516. . . . Neither the power to tax nor the police power may be used by the state of destination with the aim and effect of establishing an economic barrier against competition with the products of another state or the labor of its residents. . . . They are thus hostile in conception as well as burdensome in result. The form of the packages in such circumstances is immaterial whether they are original or broken." Baldwin *v.* G. A. F. Seelig, 294 U. S. 511, 526, 527. (Italics supplied.)

create no unfair multiplication of taxes and would not be unconstitutional.[23] The manufacturer who receives protection under the laws of Indiana and the distributors who receive protection under the laws of the States in which products are sold, should be subject to uniform, non-discriminatory taxes imposed by the sovereign power of the States in which both do business under State protection.

Judicial interpretation of the Commerce Clause gradually evolved the principle that non-action by Congress is tantamount to a congressional declaration that the flow of commerce from State to State must be free from unfair and discriminatory burdens.[24] Throughout the decisions upon the question has run recognition of the supreme power of Congress to regulate interstate commerce, and the courts have stricken down state taxes when found to raise barriers impeding the free flow of commerce between the States, but not obstructing commerce between citizens within a single State. Courts—in the absence of congressional regulation of interstate commerce—have acted because there " . . . would otherwise be no security against conflicting regulations of different States, each discriminating in favor of its own products and citizens, and against the products and citizens of other States. . . . it is a matter of public history that the object of vesting in Congress the right to regulate commerce with foreign nations and among the States was to insure uniformity of regulation against conflicting and discriminating State legislation."[25] With reference to borderline laws, it has been significantly pointed out that there " . . . is also, in addition to the restraint which those provisions [the Commerce Clause] impose by their own force on the State, the unquestioned power of Congress, under the authority to regulate commerce among the States, to interpose, by the exercise of this power, in such a manner as to prevent the State from any oppressive interference with the free interchange of commodities by the citizens of one State with those of another."[26]

If it be true, as urged, that some state gross receipts taxes may possibly in the future be multiplied so as to burden interstate commerce unfairly, it is equally true that other state gross receipts taxes

23 Sonneborn Bros. *v.* Cureton, 262 U. S. 506.

24 See, Phila. Steamship Co. *v.* Pennsylvania, *supra.*

25 County of Mobile *v.* Kimball, 102 U. S. 691, 697.

26 Woodruff *v.* Parham, 8 Wall. 123, 140.

(as the Indiana tax) may not, in the absence of such multiplication, result in such burdens. Since the present litigation has developed that no such unfair burdens have been imposed upon appellant's interstate business, appellant can only be exempted from payment of this tax by application of a regulatory rule or law which condemns *all* such state taxes—whether fair or unfair. If such a general rule or law is to be promulgated it would seem that under our constitutional division of governmental powers such a regulatory policy should be considered and determined by Congress under its exclusive grant. It will be time enough for judicial protection when a litigant actually proves, in a particular case, that state gross receipts taxes levied against the litigant have resulted in unfair and unjust discrimination against the litigant because of engagement in interstate commerce. Many arguments—which we might believe to be sound—can be advanced against the legislative policy of a gross receipts tax. These objections, however, are not the criterion of its constitutionality. With the wisdom of such fiscal policy of a State we are not concerned.[27] The interests of interstate commerce will best be fostered, preserved and protected—in the absence of direct regulation by the Congress—by leaving those engaged in it in the various States subject to the ordinary and non-discriminatory taxes of the States from which they receive governmental protection. For these reasons I believe that the entire judgment of the court below should be affirmed.

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[27] Cf. Purity Extract Co. *v.* Lynch, 226 U. S. 192.